SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970.

No. 947

FONTANA AVIATION, INC., A CORPORATION,
Petitioner,

vs.

BEECH AIRCRAFT CORPORATION, A CORPORATION, AND HARTZOG-SCHNECK AVIATION, INC., A CORPORATION,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petitioner, Fontana Aviation, Inc. prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above entitled cause on September 23, 1970 insofar as the judgment failed to disturb the District Court's grant of a new trial based solely on the same legal grounds held erroneous by the court below in reversing the District Court's grant of judgment N. O. V.

CITATIONS TO OPINION BELOW

The District Court's memorandum opinion is unpublished and is printed in Appendix B, *hereto infra*, pp. A3-A15. The opinion of the Court of Appeals is as yet unpublished and is printed in Appendix B, *infra*, pp. A28-A32.

JURISDICTION

The judgment of the Court of Appeals was entered on September 23, 1970 (Appendix B, *infra*, pp. A33-A34). A Petition for Rehearing with respect only to the matter of taxing costs was granted and the judgment was modified in this regard on October 19, 1970 (Appendix C, *infra*, pp. A35-A36). The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED

Petitioner alleged that its Beechcraft dealership was terminated pursuant to a conspiracy in violation of Section 1 of the Sherman Act and that as a consequence it had lost new airplane sales and profits it would have made but for the illegal termination. A jury returned a verdict for petitioner and assessed actual damages of $150,000. The trial judge granted judgment notwithstanding the verdict on the sole ground that the evidence was insufficient as a matter of law to prove the fact of damage, and conditionally granted defendants' motion for a new trial on the same ground. The Court of Appeals reversed, holding that the fact of damage was "implicit" in the violations alleged and proven, and that the claimed injury "flows naturally and expectedly" from the illegal termination. The court below also held that the jury's finding of the antitrust violations was supported by substantial evidence and further that the damage proofs were not only competent but also more than adequately supported

the amount of the verdict. The Court of Appeals nevertheless declined to disturb the new trial order.

The questions presented are:

1. Whether in a private antitrust action the jury's determination of the cause of injury and of its amount, when supported by competent and legally sufficient evidence, is conclusive and precludes the trial judge from usurping the jury's function by setting aside the jury's verdict and granting a new trial on the ground that the evidence failed to establish the fact of damage.

2. Whether reversal of a judgment N. O. V., which judgment was based entirely on a mistake of law as to the legal sufficiency of the damage proofs, automatically eliminates the basis for a new trial order based solely on the same ground and therefore requires reversal of the new trial order as well.

3. Whether the refusal of the court below to disturb the new trial order while at the same time holding there was competent, substantial evidence to support (1) the jury's verdict and finding of antitrust violation, (2) the fact of damage and (3) the damage amount, constitutes an undue invasion of the right to a jury trial as guaranteed by the Seventh Amendment.

STATUTORY PROVISIONS AND RULES INVOLVED.

The statutory provisions and the rules involved are Section 1 of the Sherman Act, 15 U. S. C. § 1; Section 4 of the Clayton Act, 15 U. S. C. § 15; and Rule 50(b) and (c) of the Federal Rules of Civil Procedure.

The foregoing statutes and rules are printed in Appendix A, *infra*, pp. A1-A2.

STATEMENT OF THE CASE.

Petitioner, Fontana Aviation, Inc. (Fontana) is a former dealer for Beech Aircraft Corporation (Beech). It is engaged in the business of selling and servicing airplanes, as well as providing various flight connected services at Ford Airport in Iron Mountain, Michigan. Fontana's dealership was terminated in April, 1966 pursuant to the antitrust violations found by the jury and as to which the court below concludes there was substantial evidence.

Respondent Beech is engaged in the manufacture, distribution and sale of aircraft under the trade name "Beechcraft". Beech sells it planes through a nationwide network of twenty-four distributors who in turn sell largely to retail dealers. Beech also owns and operates four distributor companies which sell both to independent dealers and directly to ultimate customers.

Respondent Hartzog-Schneck Aviation, Inc. (Hartzog) is a Beech distributor located in Rockford, Illinois. Hartzog is the Beech distributor with whom Fontana had a dealer contract at the time of termination. Hartzog sells to independent dealers such as Fontana and also sells directly to consumers through its wholly-owned dealer company.

Shortly following termination of its dealer contract petitioner brought this antitrust action for damages and injunctive relief alleging a combination and conspiracy among Beech and the Beech distributors in violation of Section 1 of the Sherman Act and that as a result of the violations alleged its dealership was terminated. The court below summarized the pertinent complaint allegation as follo (App. B, *infra*, p. A19):

> "[The complaint alleged] a conspiracy whereby the United States was divided into exclusive terri-

tories with each distributor having a separate territory and with distributors being restricted from competing in each other's territory; prices were fixed on the resale of new Beech aircraft; illegal demonstrator and stocking requirements were imposed on independent dealers and restriction was made on the sale of a new model aircraft known as the King Air Model to distributor organizations or their wholly owned dealer companies. Fontana claimed that its dealer contract was cancelled by Hartzog pursuant to the alleged conspiracy when Fontana refused to acquiesce in territorial, stocking and airplane model restrictions and that Fontana, subsequently, was unable to secure a dealership from other distributors [because of the restriction on appointment of out-of-territory dealers]."

Following a five week jury trial, a verdict was returned in favor of Fontana in the amount of $150,000, on which the court entered judgment in the trebled amount of $450,000, together with costs and attorneys' fees. Thereafter, pursuant to defendants' motion, the District Court vacated the treble damage judgment and entered judgment for defendants notwithstanding the verdict. The District Court "assumed" defendants were guilty of antitrust violations but held that petitioner had failed to prove the fact of damage. In reaching this conclusion the District Court rejected the damage proofs on legal grounds held to be erroneous by the court below. The District Court also, without any discussion, and on the *same* grounds, conditionally granted defendants' motion for a new trial "should this judgment be vacated or reversed."

The court below reversed, holding that there was substantial evidence to support the jury verdict and finding of antitrust violation and that the fact of damage was implicit in the violation found. Apart from the evidence offered on this issue by petitioner the court said "[W]e are in a day and age in which the value of the nationally

advertised franchise is a matter of general recognition. If Fontana were deprived of the dealership (or franchise right) as a result of an illegal conspiracy, some damage would appear to be implicit" (App. B, *infra*, p. A29). Further the court pointed out, "Beech's Vice President conceded that Fontana would be at a competitive disadvantage in attempting to sell new Beech airplanes after the loss of its authorized dealer status" (App. B, *infra*, p. A29). The court concluded therefore that "[i]nsofar as the ruling on judgment N. O. V. was concerned, the fact that the alleged illegality put plaintiff at a competitive disadvantage in competing for the business of a number of identified prospects was adequate to make erroneous the ruling on the motion for judgment N. O. V." (App. B, *infra*, p. A29).

The court below further stated, "[o]nce there is sufficient evidence of the fact of damage to go to the jury, the assessment of the amount is largely a matter of the jury's consideration of all the evidence. *Bigelow* v. *RKO Radio Pictures*, 327 U. S. 251, 264 (1946)." (App. B, *infra*, pp. A30-A31.)

The Court of Appeals declined, however, to disturb the new trial order notwithstanding the fact that it was based entirely on the same legal grounds held to be erroneous by the court in reversing the judgment N. O. V.

THE ANTITRUST VIOLATIONS.

The standard Beech distributor and dealer agreements on their face and without more established an interlocking network of horizontal agreements among competitors not to compete in each other's exclusive territory (PX 106, 101, A. 1589, 1540).[1] It was a *violation* of the agreements for the distributors or their dealers to advertise or solicit

1. References are to the printed Appendix in the Court of Appeals.

new plane sales outside the distributor's assigned territory. When a distributor (or his dealer) was contacted by an out-of-territory prospect for a price quotation, the distributor was to "immediately communicate with the distributor in whose territory the prospect belongs for the purpose of determining the sales action to be pursued" (A. 89-90). The agreements warned that under no circumstances was the customer or prospect "to be made involved in or aware of any controversy or inter-territory negotiations between distributors" (A. 90-1).

The distributors, including Hartzog, and high officials of Beech met together at distributor council meetings and agreed to continue to observe the territorial restrictions in the standard agreements. They did so although aware of the antitrust ramifications because they wanted the "protection" afforded by the agreements (A. 371-3, 1404). When Beech acquired its own distributorships it wrote the other Beech distributors that it would be bound by the same "standard policies and practices" contained in the standard agreements (PX 132, A. 1714; 908-09).

The territorial limitations were enforced by the distributors and Beech through assessment and collection of infringement penalties. When out-of-territory sales were made without prior agreement with the distributor in whose territory the customer belonged, the infringing distributor was required to pay a penalty assessed by Beech or forfeit all discounts on future plane purchases (A. 94, 104-5, 153-63, 367). Similar restrictions and penalties were imposed on sales by dealers outside his distributor's assigned territory. On one occasion Fontana was threatened with cancellation of its dealer contract by Hartzog and "fined" $1,000 for selling an airplane to a customer in another distributor's territory (A. 92-103).

It was admitted that the purpose of the territorial

restrictions and other provisions in the standard agreements was to suppress price competition between the Beech distributors and their dealers (A. 90-1, 101-2). A Beech vice president testified the purpose was "to divide the spoils from the dual effort" (A. 861).

The court below held that the foregoing evidence supported the jury finding that the factual situation was as follows (App. B, *infra*, p. A19):

> "Prior to 1966, Beech's contracts with its distributors, and the contract that Beech distributors had with their dealers, contained limitations upon the sale of airplanes outside the distributors' or dealers' territory. There were provisions for inter-territorial financial adjustments if such sales outside the territory took place. Further these territorial limitations had been the subject of discussion between Beech and its distributors. These discussions ordinarily occurred at meetings of the Beech distributor advisory council which met and discussed mutual problems. The council included the president of Hartzog and the meetings were attended by officials of Beech. In February 1964, the minutes of the council indicated that there had been concern expressed at legal ramifications of the portion of the contract dealing with the territorial restrictions."

The court below further held with respect to this evidence that "the jury reasonably could have found that for the purpose of lessening competition a rigid territorial division had been worked out on a horizontal basis between the various distributors with the tacit approval of Beech, which also participated therein through its own distributor companies" (App. B, *infra*, p. A24).

In addition to the territorial restrictions, Beech, by agreement with the distributors, imposed airplane stocking requirements on independent dealers which were intended to and had the effect of foreclosing competition in the sale

of the larger twin engine or corporate class airplanes by removing them from the economic reach of independent dealers (PX 21, A. 1313-14).

The Beech sales policy manual which was incorporated by reference into the standard distributor agreements *required* as a minimum that the dealer stock in inventory or as a current model demonstrator the model or class of plane sold in order to be entitled to a Class A discount of 20% (PX 68, 71, A. 1387, 1391). Hartzog's dealer contracts (as well as those of other distributors) which were expressly approved and countersigned by Beech at all times contained these minimum requirements (PX 54, 105, A. 1368, 1577). Dealers who did not satisfy Class A requirements were Class B and received a lesser discount percentage, usually only 10%.

As non-stocking dealers with only a 10% margin, the independent dealers could not compete in price with the distributors' own dealer companies which received the full 20% discount without being required to comply with the foregoing stocking requirements (A. 83-4, 343, 886-7).

Further, in the case of the new King Air model, Beech and the distributors agreed that sale of this airplane would be restricted to the distributor organizations or the distributors' own dealer companies. The standard distributor agreements provided that "All King Air firm orders are to be the result of contractual *retail* (only) sales commitments on the part of the King Air distributor ordering the airplanes" (PX 130, A. 1687). A Beech vice president testified "we do not accept orders from distributors for King Airs other than demonstrators unless it is the result of a retail sales commitment on their part" (A. 571) and that this provision precluded distributors from franchising independent dealers to sell the King Air and that this continued to be Beech's policy until at least February, 1968 (A. 571), well after termination of Fontana's dealer-

ship. As a consequence independent dealers were foreclosed from purchasing King Air aircraft for resale or demonstration and were confined to a sales agent's or "bird dog" role with no control over price in the sale of this aircraft (PX 21, A. 1313-14).

While the court below in its opinion did not specifically discuss the evidence with respect to the stocking and King Air restraints, it observed, "we find adequate supportive evidence in the overall pattern of operation on which to base a verdict with regard to the other matters of complaint by Fontana, being the stocking requirement and the restraint on sale of King Airs. All of these matters could well have been found by the jury as having been conceived as part of an illegal market control" (App. B, *infra*, p. A25).

THE FACT AND AMOUNT OF DAMAGE.

Fontana's dealer contract was terminated in early 1966 when it sought a contract precluded by the conspiracy terms. Fontana sought a contract and terms which would permit it to compete in the sale of corporate class planes with Hartzog's own dealer company. Specifically, Fontana demanded to be franchised to sell the profitable King Air as well as other larger airplanes (A. 396-8). Fontana wanted a 20% discount but objected to stocking the entire line of Beech planes in order to be entitled to it (A. 182, 317). This request was refused by Hartzog and when Fontana persisted in its demands Hartzog terminated Fontana's dealership (A. 183). These conversations occurred while the 1965 distributor agreements were still in effect (A. 181).

Following notice of termination Fontana contacted two other nearby Beech distributors in an effort to secure a dealer contract. At that time the distributor agreements

had been amended to delete the express restrictions on out-of-territory airplane sales and the infringement penalty provisions. However, there were no changes in the territorial assignments in the 1966 contracts. What was previously the distributor's "exclusive territory" became his "area of responsibility." Appointment of "authorized" dealers was restricted to those located within the distributor's assigned territory (PX 99, A. 1526-6; A. 115, 351-2).

Both distributors contacted by Fontana expressed initial interest. After checking with Beech, however, and finding that Beech opposed the appointment because of the fact Fontana would be an out-of-territory dealer, the distributors declined to appoint Fontana a dealer (A. 406-8, 674-5). One distributor testified that appointment of Fontana would represent a change in Beech's marketing policy as he understood it and that if he were to appoint Fontana in disregard of this policy Hartzog was likely to retaliate by appointing a dealer in his distributor territory because it was a "two-way street" (A. 1116-17, 1124).

The court below held that the evidence was sufficient to support a jury finding that both the termination and refusal to appoint were in furtherance of the conspiracy terms, stating (App. B, *infra*, p. A20):

> ". . . Early in 1966, when the corporate class plane market was just beginning to develop, representatives of Fontana and Hartzog met, at which time Fontana indicated it wanted a dealer contract which would permit it to sell the relatively new King Air without being required to purchase and stock the entire line of Beech planes necessary to obtain a twenty percent discount. Hartzog replied that Fontana should confine its sales efforts to single engine and light twin planes only and that it would not receive a contract permitting it to sell King Air. Fontana indicated it would attempt to secure a direct dealership from Beech. Hartzog replied that if it did so Hartzog would cancel Fontana's contract.

> Subsequently, Fontana unsuccessfully attempted to secure a direct dealership from Beech, which declined to deviate from its established marketing setup through distributors. Thereafter, Hartzog terminated the Fontana dealership contract as of April 15, 1966. Subsequently, Fontana sought to secure an authorized dealership from two other distributors, one located in Pontiac, Michigan, and one located in Rochester, Minnesota. These distributors, after checking with Beech, declined to enter into a dealership contract with Fontana."

The damage claim was divided into two categories: (1) those damages attributable to the conspiracy restraints during the period Fontana was a dealer under Hartzog, and (2) those damages attributable to claimed loss of aircraft sales during the period after termination to date of trial.

As to the former, petitioner claimed total damages of $69,423 consisting of (1) $1,000 based on an infringement penalty assessed against it for making an out-of-territory sale in violation of the territorial restrictions (PX 8 & 9, A. 1291-1293); (2) $11,750 and $7,365 on two airplane sales where under the conspiracy terms it was limited to a non-stocking dealer discount of only 10% instead of the 20% discount received by Hartzog's own dealer company without stocking (PX 125B & 125C, A. 1681); and (3) $49,308 on a King Air sale where under the conspiracy terms it was limited to a sales agent's commission of $12,500 instead of the 20% discount received by Hartzog's own dealer company (PX 125A, A. 1680).

The court below expressly held that the territorial restraints and infringement penalty provisions violated Section 1 and that there was substantial evidence to support a jury finding and verdict based thereon. The court also held that there was "adequate supportive evidence" from which the jury could find that the stocking and King Air restraints were part of the overall conspiracy to withdraw the corpo-

rate class plane market from the independent dealers (App. B, *infra*, p. A25).

Further, the court below held with respect to the pre-termination damages that the trial judge erred in examining each item separately and without regard to the overall conspiracy or pattern of "illegal market control" (App. B, *infra*, p. A31).

There is no suggestion in the opinion of the court below that the pre-termination damage proofs were not competent proof of both the fact and amount of damage to the extent of the $629,000 shown; however, since these damages would not, standing alone, support the full amount of the jury verdict of $150,000, the court devoted its discussion of the damage issues to the post termination damages.

As to post-termination damages, petitioner offered the testimony of its officer that as a terminated dealer it was unable to sell new Beech airplanes or pursue qualified prospects who had manifested interest in purchasing planes (A. 677-8). After termination, Fontana had no established source of supply, no access to demonstrator aircraft, no information on current prices, no sales and technical data, and no access to Beech service and sales school support and training for its staff (A. 542-51, 689-99, 720-5). Further, Beech's own vice president admitted that a terminated dealer trying to sell new aircraft without a dealer contract was under a crippling "competitive disadvantage" (A. 551).

The court below held that this evidence alone established that petitioner had suffered damage as a result of the illegal termination of its dealer contract (App. B, *infra*, p. A29).

Proof of the amount of post-termination damages was substantially based on the testimony and estimate of Fontana's officer that with its normal 10% customer discount

(substantially more than that allowed by Hartnog's dealer company) it would have sold various models of new Beech planes to seventeen identified prospects who had asked Fontana for price quotations. As to these prospects the court below observed, "there was supportive evidence that all of the prospects already owned planes and that they had business needs for executive aircraft as well as having some business connection in the Iron Mountain, Michigan region. Fontana had previously sold planes to and done service work for some of the prospects and a number of the prospects subsequently did purchase aircraft" (App. B, *infra*, p. A27).

Fontana's officer further testified that Fontana would have realized a profit of 10% on these sales if completed; that other than minimal selling and demonstration expenses no additional expenses (over and above existing overhead burden) would be incurred in making these sales; and that even these few expenses would be paid for out of charter revenues earned on the demonstrator aircraft.

The total claimed lost profits or damages on these sales was $209,800.

Regarding the competency and weight to be given to this testimony, counsel for Beech said (A. 716):

> "I could certainly have *no objection* to the witness testifying, if you had sold prospect A, whom you had named, at such and such a price, what would your profit have been: . . . The evidence as to their status is in the record. I suggest that how many of them he would have sold is precisely what we have, among other things, the jury here to determine . . ."

The court below, while characterizing the damage estimate as "weak", held that the estimate was competent evidence and recognized that the fact that petitioner had been operating under the conspiracy restraints and was terminated just as the corporate airplane market was de-

veloping "did not present the usual situation" so as to permit a before and after earnings comparison. Further the court said the matter of the weight to be given to the damage testimony was for the jury and observed "the jury may well not have accepted the Fontana witness' assertion as to some of the alleged prospects and may have reduced the damage award accordingly. Apparently this is what happened, for the jury award is substantially less than the amount plaintiff asserted as its damages" (App. B, *infra*, p. A30).

The court below then proceeded to hold erroneous as a matter of law the various grounds relied on by the District Court in rejecting the post-termination damage proofs.

First, the District Court had held that as a matter of law petitioner could not recover damages with respect to those prospects who came to petitioner only after the filing of the complaint (App. B, *infra*, p. A11). Concerning this ruling the court below said (App. B, *infra*, p. A30):

> "The determination of the trial court in this respect is erroneous even on the amount of damage issue. It is clear some post-filing damages may be recovered in antitrust suits. Where the alleged damages are the result of acts occuring prior to the filing of the complaint, there can be no doubt that they may be recovered even though they may have occurred following such filing. *Lawlor* v. *Loewe*, 235 U. S. 522, 536 (1915) and *Becken Co.* v. *Gemex Corp.*, 314 F. 2d 839, 842-43 (7 Cir. 1963). In the instant case the alleged damages resulted from plaintiff's inability to compete. The cause of that inability to compete was the single act of defendants, occuring before the filing of the complaint, in depriving plaintiff of his authorized dealer status."

Second, the District Court had held that while there was evidence that plaintiff would be at a competitive disadvantage in attempting to sell new Beech aircraft as an "unauthorized" dealer, it had not "specifically demonstrated"

that this was true in the case of the 17 prospects mentioned (App. B, *infra*, p. A11). Concerning this ruling the court below said (App. B, *infra*, p. A29):

> "As to the contention by Hartzog and Beech that plaintiff could have obtained new Beech aircraft from Beech distributors even without an authorized dealer status, problems existed. Beech's Vice President tacitly admitted that this theoretical possibility was not a practical solution when he testified to the many technical services that are available only to authorized Beech dealers and conceded that unauthorized dealers would be at a competitive disadvantage.
>
> Further there was evidence that the plaintiff did attempt to compete in this manner on at least two separate occasions but unsuccessfully so. Fontana was not bound to make repeated requests for airplanes from Beech distributors or to exhaust every possible avenue to avoid the effects of defendant's alleged illegal activity but could maintain an action for an injury which flows naturally and expectedly from such activity. *Zenith supra* at p. 114 n. 9; *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U. S. 690, 696-702 (1962)."

Third, the District Court, while crediting the damage testimony, had held that petitioner had a duty to present the "best available evidence" and thus was required to depose or call at the trial each of the 17 prospects to establish through their testimony that they would have purchased from Fontana had Fontana been a dealer (App. B, *infra*, p. A12). Concerning this ruling, the court below held that petitioner was not required to depose or call each of the prospects and its failure to do so went only to the weight of the evidence and not its competency. The court pointed out that petitioner's failure to call the prospects "undoubtedly weakened plaintiff's case", but that the jury had apparently taken this factor into account in fixing the damage award (App. B, *infra*, p. A30).

The Court of Appeals concluded by stating, "what we have said is sufficient to indicate the error of the trial court in finding that the evidence on the fact of damage issue was overwhelming and conclusively against Fontana. Once there was sufficient evidence of the fact of damage to go to the jury, the assessment of the amount is largely a matter of the jury's consideration of all the evidence. *Bigelow* v. *RKO Radio Pictures*, 327 U. S. 251, 264 (1946)" (App. B, *infra*, pp. A30-A31).

THE NEW TRIAL ORDER.

The conditional grant of the new trial was based on the *same* ground as the grant of judgment N. O. V., to wit: that petitioner had failed to prove the fact of damage. The trial judge mentioned no additional grounds for the new trial order. Indeed, there is no separate discussion of the new trial motion at all. The District Court's opinion is devoted entirely to a discussion of the N. O. V. motion and the legal reasons assigned for rejecting the damage proofs. In a formal one sentence compliance with Rule 50(c), the trial judge, after granting defendants' motion for judgment N. O. V., added, "defendants' motion for a new trial is conditionally granted, should this judgment be vacated or reversed, Rule 50(c), Fed. R. Civ. P." (App. B, *infra*, p. A15). The accompanying judgment order merely recites: "If the aforesaid judgment be vacated or reversed, then defendants' motion for a new trial is granted *on the grounds set forth in the Court's memorandum opinion*" (A. 65).

It is thus apparent from the face of the order that in granting the new trial the court relied on the same grounds assigned in rejecting the damage proofs and deciding the N. O. V. motion—grounds which the opinion of the court below expressly holds to be erroneous as a matter of law and factually disproven by the record evidence.

Further, in their brief in the court below, defendants conceded that the grant of a new trial was solely on the fact of damage issue and that the District Court did not purport to hold that "defendants should receive a new trial because . . . the *amount* of the verdict was against the clear weight of the evidence or was such that a miscarriage of justice would result if it was permitted to stand" (Br. p. 3).

Nevertheless, the court below refused to disturb the new trial order stating, "since the court in its discretion was satisfied in the event the judgment notwithstanding the verdict was not upheld that an adequate basis for a new trial existed, at least on the question of damages, we will not disturb that exercise of his discretion" (App. B., *infra*, p. A31). In this connection the court apparently misread this Court's opinion in *Zenith Radio Corporation* v. *Hazeltine Research Inc.*, 395 U. S. 100, 123 (1969) and concluded that the same deference must be given the trial judge's ruling on a new trial motion in a jury case, even though based on a mistake of law as to the legal sufficiency of the evidence, as that accorded findings of the trial judge in a non-jury case (App. B, *infra*, p. A26).

The court reaches the conclusion that the new trial order should not be disturbed notwithstanding its own earlier determinations that the fact of damage was "implicit" in the violation shown; that the undisputed evidence established that petitioner could not successfully compete as an "unauthorized" dealer; that the damage proofs more than supported the jury's verdict; and that once the fact of damage is shown "the assessment of the amount is largely a matter of the jury's consideration of all the evidence."

REASONS FOR GRANTING THE WRIT.

I.

The decision of the Court of Appeals in permitting a second trial of the damage issues notwithstanding its holding that the jury's determination of the cause of injury and of its amount was supported by competent and legally sufficient evidence directly conflicts with the decisions of this Court in *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U. S. 359, 379 (1927), *Bigelow* v. *RKO Radio Pictures*, 327 U. S. 251, 254-5 (1946), *Continental Ore Co.* v. *Union Carbide Corp.*, 370 U. S. 690, 700-1 (1962) and *Perkins* v. *Standard Oil Co.*, 395 U. S. 642, 648 (1969).

Petitioner proved a *per se* violation of the antitrust laws and loss of its Beech dealership as a direct consequence thereof. As the court below observed, the claimed damage and injury "flows naturally and expectedly" from defendants' illegal activity in depriving plaintiff of his authorized dealer status. The court held that the damage estimate of lost sales and profits was competent evidence and the weight to be given it was for the jury.

The court below noted that even the trial judge recognized that the damage testimony was competent, stating, "[T]here is no indication in the record that the court struck the testimony as being speculative or conjectural or that the entry of the judgment N. O. V. was based upon this premise. The trial judge's memorandum opinion specifically stated that it was without regard to issues of credibility" (App. B, *infra*, p. A28).

The jury was instructed that it could not award speculative damages, that there had to be some reasonable basis in the evidence for the damages awarded (A. 1255) and that it could consider Joseph M. Fontana's testimony only if satis-

fied it was based on facts which rationally supported it (A. 1256).

The jury's verdict of $150,000 was not excessive. The damage proofs would have supported a verdict substantially in excess of this amount. And the reasonableness of the verdict reached is indicated by the fact that the trial judge predicted to counsel that the jury would return a verdict in this exact amount.

There is no suggestion either in the opinion of the court below or of the District Court that anything occurred during the trial which may have resulted in the jury receiving a distorted, incorrect or incomplete view of the operative facts. The new trial order was not granted on the ground that evidence was improperly admitted or rejected, error in instructions, prejudicial statements or any other ground allegedly constituting prejudicial error.

The *sole* ground for the new trial order was that petitioner failed to prove the essential fact of damage. In reversing, the court below held that not only was there substantial evidence of the fact of damage but also that the fact of damage was "implicit" in the violations proven.

As this Court has repeatedly held, and even the court below acknowledges, once the fact of damage is shown the question of amount is for the jury to determine upon consideration of all the evidence. Where there is competent evidence as to the amount of damages and the damage proofs more than support the jury award and the jury has been properly instructed as to the standards to be applied in determining damages, as here, the jury's determination is conclusive.

In *Eastman Kodak* this Court, in affirming the damage award, held "the jury was instructed, in effect, that the amount of damages could not be determined by mere speculation or guess, but must be based on evidence furnishing

data from which the amount of probable loss could be ascertained as a matter of reasonable inference. And the question of amount of the plaintiff's damages having been properly submitted to the jury, its determination as to this matter is *conclusive*" (273 U. S. at 379).

Similarly in *Bigelow* this Court said, "[T]he jury may make a just and reasonable estimate of the damage based on relevant data and render its verdict accordingly . . . [T]he wrongdoer may not object to the plaintiff's reasonable estimate of the *cause of injury and of its amount* supported by the evidence because not based on more accurate data which the wrongdoer's misconduct has rendered unavailable . . ." (327 U. S. 251, 254-5).

In *Perkins*, this Court again reiterated, "[I]f there is sufficient evidence in the record to support an inference of causation, the ultimate conclusion as to what the evidence proves is for the jury" (395 U. S. 642 at 648).

See also concurring and dissenting opinion of Mr. Justice Black in *Simpson* v. *Union Oil Company*, 396 U. S. 13, 17 (1969).

In the face of these decisions and its own holding that once the fact of damage is shown "the assessment of the amount is largely a matter of the jury's consideration of all the evidence" (App. B, *infra*, pp. A30-A31), the court below nevertheless sanctioned the District Court's usurpation of the jury's prime function as the trier of fact by refusing to reverse the new trial award on the damage issues.

II.

The anomalous decision of the court below in refusing to reverse the new trial order based on the same mistake of law as the grant of judgment N. O. V., which was reversed, so far departs from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

It is fundamental that when a new trial is granted on mistaken legal grounds, as opposed to discretionary grounds, no question of abuse of discretion is involved and it is only necessary to demonstrate that the legal grounds assigned are erroneous. If the legal grounds relied upon by the trial judge are erroneous, as the court below has held, the new trial order must be reversed as a matter of law. See *Fairmount Glass Works* v. *Cub Fork Coal Co.*, 287 U. S. 474 (1933); *Finn* v. *American Fire & Casualty Co.*, 207 F. 2d 113 (5th Cir. 1953); 6A Moore's Fed. Prac. ¶ 59.15[3] pp. 3903-4.

It is apparent from even a cursory reading of the District Court's opinion that the legal grounds assigned are erroneous and that the court misapprehended "the burden of proof which may be demanded of a treble damage plaintiff who seeks recovery for injuries from a partial or total exclusion from a market" (395 U. S. 123). The court was of the opinion that petitioner could only prove damages in one of the following ways: (1) pre-conspiracy earnings experience (before and after comparison); (2) earnings experience of a comparable but unrestrained enterprise during the conspiracy period; and (3) expert opinion based on either (1) or (2). See App. B, *infra*, p. A12.

The District Court held that Fontana's testimony as to lost sales and profits did not satisfy these criteria because not based on either "historical or comparative data" and further that petitioner was required to produce "the best available evidence" in proof of its claimed damages. This required either deposing or calling at the trial each of the prospects to establish through *their* testimony their status as prospects and willingness to buy.

The court below in reversing held that "while proof of loss by the particular method adopted by Fontana does not meet the ordinary standards . . . the circumstances of plaintiff's business and developing corporate airplane

market did not present the usual situation." The court held that the damage testimony was competent (see e.g. *A. C. Becken Co.* v. *Gemex Corporation*, 272 F. 2d 1, 5 (7th Cir., 1959); *William H. Rankin Co.* v. *Associated Bill Posters*, 42 F. 2d 152, 155 (2d Cir., 1930)) and further that petitioner was not required to call the prospects as witnesses, stating that the fact it did not went only to the weight of the damage proof.

The court below also reversed on legal grounds the District Court's holding that petitioner could not recover damages with respect to those prospects who came to petitioner after filing of the complaint, holding that petitioner's inability to compete for this business was due to "the single act of defendants, occurring before the filing of the complaint, in depriving plaintiff of his authorized dealer status." On the basis of this error of law alone the District Court had held petitioner's damage claim should be reduced by $80,300.00.

Finally, the court below rejects as contrary to the evidence and legally erroneous the District Court's contention that petitioner could have operated as well without a dealer contract and could have successfully competed by purchasing airplanes from other Beech distributors. The court said that there were problems which rendered this "theoretical possibility" not a "practical solution" and that petitioner had attempted "to compete in this manner on at least two separate occasions but unsuccessfully so." The court added that petitioner was under no legal duty "to exhaust every possible avenue to avoid the effects of defendants' alleged illegal activity, but could maintain an action for an injury which flows naturally and expectedly from such activity", citing this Court's opinions in *Zenith* (395 U. S. 100, 114) and *Continental Ore* (370 U. S. 690, 696-702).

Thus, as appears from the opinion of the Court of Appeals, each of the grounds relied on by the District Court in rejecting the damage proofs and entering judgment N. O. V. was erroneous as a matter of law. Since the new trial order was based on these same grounds, the new trial order necessarily should have been reversed as well.

III.

The decision of the court below in refusing to disturb the new trial order requires petitioner to begin all over again before a second jury, notwithstanding that there was substantial evidence to support the jury's finding and determination with respect to the liability and damage issues, and that nothing occurred during the course of the trial which may have prevented the jury from reaching a fair verdict.

These circumstances, we submit, warrant the exercise of this Court's supervisory power with respect to conduct of jury trials in private antitrust actions.

There is a growing tendency by the lower courts to pay "lip service" to the antitrust decisions of this Court but nevertheless deny effective relief to plaintiffs in treble damage actions by sending the case back for a second and unnecessary trial. See *e.g.*, *Zenith Radio Corporation* v. *Hazeltine Research, Inc.*, 418 F. 2d 21 (7th Cir. 1969); *Utah Pie Company* v. *Continental Baking Company*, 396 F. 2d 161 (10th Cir. 1968); *Florist's Nationwide Tel. Del. Net.* v. *Florist Tel. Del. Ass'n.*, 371 F. 2d 263 (7th Cir. 1967); *Cf. Simpson* v. *Union Oil Company*, 396 U. S. 13 (1969), dissenting opinion Mr. Justice Black.

Requiring a second and unnecessary trial not only places an intolerable burden on petitioner (who has been without a dealership for almost five years) but is the kind of disposition which threatens to seriously weaken effective enforcement of the antitrust laws by private actions.

This Court is well aware of the large expense involved in antitrust litigation. The instant trial took five weeks. Few litigants can afford the expense of one five-week trial, let alone two.

If an antitrust plaintiff must try and win his case twice in circumstances like these, the protection of the antitrust laws will be available only to the corporate giants and the effectiveness of private enforcement, the importance of which this Court has repeatedly recognized, will depend on the relative length of the litigant's purse strings.

CONCLUSION.

For the reasons given this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A.

The statutory and rule provisions involved are:

Section 1 of the Sherman Act, 15 U. S. C. § 1, providing in pertinent part:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: . . ."

Section 4 of the Clayton Act, 15 U. S. C. § 15, providing:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

Rule 52(b) of the Federal Rules of Civil Procedure providing in pertinent part:

> ". . . Not later than 10 days after entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict. . . . A motion for a new trial may be joined with his motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. . . ."

Rule 52(c) of the Federal Rules of Civil Procedure providing in pertinent part:

> "(1) If the motion for judgment notwithstanding the verdict, provided for in subdivision (b) of this rule, is granted, the court shall also rule on the motion for a new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for the new trial. If the motion for a new trial is thus conditionally granted, the order thereon does not affect the finality of the judgment. In case the motion for a new trial has been conditionally granted and the judgment is reversed on appeal, the new trial shall proceed unless the appellate court has otherwise ordered. . . ."

APPENDIX B.

In the United States Court of Appeals
For the Seventh Circuit.

Nos. 17,734 and 17,735.

Fontana Aviation, Inc., a Corporation,
Plaintiff-Appellant,

vs.

Beech Aircraft Corporation, a Corporation, and Hartzog-Schneck Aviation, Inc., a Corporation,
Defendants-Appellees.

MEMORANDUM OPINION OF DISTRICT COURT.

(Filed March 7, 1969.)

Cross Motions for Judgment Notwithstanding the Verdicts.

Plaintiff, Fontana Aviation, Inc. (Fontana), began this civil antitrust action on May 16, 1966, seeking a treble damage award and injunctive relief. The first count of its two count complaint alleged a combination and conspiracy in violation of section 1 of the Sherman Act, 15 U. S. C. 1, between defendant Beech Aircraft Corporation (Beech), Hartzog-Schneck Aviation, Inc. (Hartzog), and certain unnamed co-conspirators. Count II was directed against Hartzog and the co-conspirators, charging them with a combination and conspiracy in violation of section 1 of the Sherman Act, 15 U. S. C. 1. Sections

4 and 16 of the Clayton Act, 15 U. S. C., secs. 15 and 26, provide for money awards and injunctive relief respectively. After a lengthy trial, a jury returned a verdict in favor of Fontana on count 1 and awarded Fontana damages to the extent of $150,000. The jury also returned a verdict in favor of Hartzog and against Fontana on defendant's counterclaim and assessed damages at $5,000.

Pursuant to Rule 50 (b), defendant Beech Aircraft Corporation has moved to set aside the verdict of the jury with respect to Count 1 of the Complaint and the judgment entered thereon, and to enter judgment for defendants in accordance with the motion for a directed verdict as to Count 1 filed by defendants Beech and Hartzog at the close of all the evidence. The grounds for this motion are (a) that except as to the matter of "infringements" there is no evidence of record upon which a jury could properly have found a violation of the anti trust laws by defendants, and (b) that plaintiff altogether failed to establish the injury or "impact" from an anti trust violation, or to show the damages in a measurable amount, indispensable to sustaining a private cause of action under the antitrust laws. Either of these grounds would independently justify the granting of Beech's motion.

Defendant has also moved, pursuant to Rule 59 of the Federal Rules, for a new trial. This motion is alternative to Beech's motion for judgment notwithstanding the verdict. Beech prays that if the n. o. v. motion is denied, the new trial motion be granted, and that if the n. o. v. motion is granted the new trial motion be conditionally granted in accordance with Rule 50 (c) of the Federal Rules of Civil Procedure.

The legal test as to the sufficiency of the evidence on a motion for judgment n. o. v. is the same as that on a directed verdict motion. *Wieloch* v. *Rogers Cartage Co.*,

290 F. 2d 235, 237 (7th Cir. 1961). In treble damage suits under the antitrust laws as with other types of actions, the trial court is:

> "bound to view the evidence in the light most favorable to (the party against whom the motion is made) and to give it the benefit of all inferences which the evidence fairly supports, even though contrary inferences might reasonably be drawn."
>
> *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U. S. 690, 696 (1962).

Having so viewed the evidence, however, there is still some confusion as to the amount of evidence which is required to support a jury verdict. There has developed "a great variety of verbal formulations, couched in generalities which are not readily applied to a particular set of facts." 2B Barron & Holtzoff, Federal Practice and Procedure, § 1075, at 399 (1961). The confusion has arisen in part from linguistic difficulties and in part from conceptual uncertainties. Comment, Directed Verdicts and the Right to Trial by Jury in Federal Courts, 42 Texas L. Rev. 1053, 1060 (1964).

In our opinion, the best judicial analysis of the standards which are and should be applied in determining whether to enter judgment n. o. v. is found in *Pedrick* v. *Peoria & Eastern Railroad Co.*, 37 Ill. 2d 494 (1967). That decision rejects the notion that the presence of any or a scintilla of evidence is sufficient to sustain a jury verdict. *Id.* at 510. We agree, for literally that would prohibit overturning a jury verdict where the overwhelming weight of the evidence is against the verdict. The Illinois Supreme Court also rejected the notion that if reasonable men could ever differ on the evidence presented, then the jury verdict must stand. Cf. *Id.* Again we agree. Under this rule, "there is at least a surface incongruity" in a trial judge saying

reasonable men could never differ when a jury just decided the issue otherwise. Thus, a judge could never properly enter a judgment n. o. v. unless he could say that the jury was comprised of unreasonable men.

To our minds, the better rule is one which permits the entry of a judgment n. o. v. in those cases where all the evidence, taken as a whole and viewed most favorably to the opponent of the motion, is so conclusively or overwhelmingly in favor of the movant that no contrary verdict could or should stand. *Gutierrez* v. *Union Pacific Railroad Co.*, 372 F. 2d 121, 122 (10th Cir. 1966); *Carroll* v. *Seaboard Air Line Railroad Co.*, 371 F. 2d 903, 904 (4th Cir. 1967); *Pedrick* v. *Peoria & Eastern Railroad Co.*, 37 Ill. 2d 494, 510 (1967); cf. *Greene* v. *Warren*, 275 F. 2d 134, 137 (8th Cir. 1960). Of course this rule is also a generalization and lacks certainty, but we believe that it focuses attention on the real issue — the sufficiency of the evidence — more accurately than do the other approaches.

Our task, then, is *to determine whether the overwhelming evidence in this case is against the jury's verdict* that Fontana was injured the extent of $150,000 by certain actions of the defendants which were in violation of the antitrust laws. As we have stated previously, defendants would be entitled to judgment n. o. v. if they were not guilty of any antitrust violations or, even if guilty of such violations, no real damages were attributable to their illegal actions. Defendants acknowledge that their pre-1966 territorial infringement system constituted an antitrust violation, but they vigorously deny that they are guilty of any other antitrust violation charged by the plaintiff. After the trial had ended, the Supreme Court decided *United States* v. *Container Corporation of America*, ___ U. S. ___ (January 14, 1969). Regarding the exchange of price information, that decision adopts a very expansive notion of what constitutes an antitrust violation. In this opinion,

we will assume, but not decide, that defendants are guilty of antitrust violations. We do so because we believe that an analysis of the proof offered with respect to the damages incurred is sufficient to dispose of the motion for judgment n. o. v.

Plaintiff claimed the following damages:

(a) $1,000 on account of an infringement payment made by it in 1961.

(b) $11,570.50 with respect to the sale of a Baron to Inland Steel in 1964 on which it claimed that but for the conspiracy it would have received a $23,141 discount but actually received an $11,570.50 discount (Tr. 1199).

(c) $49,524 with respect to a Kingair sale to Inland Steel in 1965 as to which it claimed that it would have received a 20% discount but for the conspiracy, but in fact received $12,500 (Tr. 1256).

(d) $7,365 with respect to a Travelair sale to Cable Constructors in 1966 as to which it claimed that but for the conspiracy it would have received a $14,780 discount but in fact received a $7,365 discount (Tr. 1197).

(e) $209,800 with respect to seventeen airplanes that it would have allegedly sold to seventeen prospects during the period since its termination, broken down to (McConnell Closing Tr. 58):

$85,000 on two Kingairs
$44,000 on two Queenairs
$34,000 on four Barons
$32,500 on five Travelairs
$12,600 on three Bonanzas
$ 1,700 on one Musketeer

It is obvious that the jury did not feel that the plaintiffs proved all of their damage claims, because the jury awarded only a little more than half of what was requested.

Moreover, we have not a little difficulty in trying to determine which proofs of damages the jury did believe because we cannot arrive at a combination of damage elements which totals the jury award. Consequently, we must look at each item.

Defendants do not challenge the jury's conclusion that the territorial infringement system as it existed prior to 1966 violated section 1 of the Sherman Act. Nor do they contest that plaintiff made a payment of $1,000 on account of the provisions of the system. What defendants contend is that the jury, in its verdict for Hartzog on the latter's counterclaim, found that plaintiff actually benefited to the extent of $5,000 from the system. Fontana reasonably suggests that defendants cannot have it both ways, that is, cannot recover a counterclaim judgment and also use the $5,000 payment as a set off. Hartzog, however, has indicated it will waive the counterclaim verdict. Moreover, this is one aspect of the damage claim as to which the jury can be said to have made a specific determination. It has held that plaintiff did benefit to the extent of $5,000 from the infringement system. We find no overwhelming evidence to refute that verdict. Consequently, viewing the evidence as a whole, it cannot be said that Fontana was injured by the infringement system to the extent of $1,000 or even at all.

The second claim of damages was for $11,570.50 of which plaintiff was allegedly deprived when it received only a 10% discount, not the regular 20% discount on the sale of a Baron airplane to Inland Steel in 1964. Yet, on cross-examination, plaintiff's president testified that he received $23,000 or cash equivalent to a 20% discount for the Baron sale (Tr. 781). In an answer to one of Hartzog's interrogatories in another case, plaintiff clearly stated that Hartzog paid $23,141 or 20% of the $115,705 list sales price to Fontana due to the latter's sale of a Baron model plane to Inland Steel (DX 37). There is no reason to discuss other

flaws in plaintiff's claim of damages arising from the Baron sale in view of these conclusive admissions by plaintiff that it actually received full payment for the sale.

Plaintiffs also claimed damages of approximately $49,524 on the sale of a Kingair plane to Inland Steel. The amount of damages is the difference between the $12,500 commission allowed by Hartzog and a 20% discount off the list price to which plaintiff believes it was entitled. Plaintiff's theory is that "(i)n an open market and absent the conspiracy plaintiff would have been entitled to parity of treatment with Hartzog's dealer company" (Plaintiff's Brief, at 41). Yet, there is no evidence to support this contention that Hartzog would have allowed plaintiff more favorable treatment than it was already getting. Not only did plaintiff's president testify that Hartzog never indicated that it would like to give plaintiff a 20% discount on the Kingair (Tr. 1247), he admitted that Hartzog "obviously didn't want to" give plaintiff such a discount (Tr. 1244, cf. 1455). Further, inasmuchas Hartzog was the only Beech distributor to allow $12,500 on a Kingair commission (DX 47a-66a), it is virtually impossible to infer that plaintiff would have been allowed any greater discount in the absence of Beech's interference.

Finally, plaintiff introduced no evidence that in 1965 it had the financial capacity to purchase and maintain a demonstrator so that would qualify for a 20% discount if one were offered. Plaintiff's president admitted that the First National Bank of Iron Mountain in Michigan said that plaintiff's credit was worthless (Tr. 884). Nor was plaintiff's financial position more strong in 1965 (DX 34). Yet, a down payment on a demonstrator would require $48,750 (R. 1731), a sum too great for Fontana to meet.

Similarly, we do not believe that plaintiff proved that it suffered any damages with respect to Cable Constructors'

Travelair. Plaintiff's president indicated that in the absence of defendants' interference plaintiff would not have received better terms because Hartzog did not want to give plaintiff the desired 20% discount (Tr. 1455). Moreover, the reason that Hartzog refused to grant the 20% discount was that plaintiff did not maintain a suitable demonstrator. Plaintiff testified at one point that it could have maintained such a demonstrator at no net cost (Tr. 1433-35). If this is so, then as defendants suggest, plaintiff had a duty to mitigate its supposed damages by maintaining a demonstrator. *American Can Co.* v. *Russellville Canning Co.*, 191 F. 2d 38, 55 (8th Cir. 1951). Plaintiffs have not explained why this was not done with regard to the Inland Baron sale or the Cable Constructors Travelair sale.

The final category of damages to be considered are those which allegedly accrued because Fontana's dealer contract was cancelled. Plaintiff claims that but for this termination, it would have sold airplanes to seventeen identified prospects and profited to the extent of $209,800. The prospects broken down by category of plane were as follows: Kingair (Cleveland Cliffs; Gus K. Neuberg); Queenair (Kimberly Clark; W. B. Thompson); Baron (Anderson, Patz, M. T. U., McGibben); Travelair (Hovie, Rosseau, Ahonnen, Saunders, Hocking); Bonanza (Lynn, Nelson, Edwards); Musketeer (Eichoff). According to plaintiff, all of the prospects already owned a plane and had a business need for an executive aircraft as well as some business connection in the Iron Mountain, Michigan, region where plaintiff was located. Further, Fontana had previously sold planes to and done service work for some of the prospects. Finally, we understand the majority of these prospects subsequently purchased an aircraft. Thus, plaintiff contends, the fact of damage is self-evident.

In the first place, we instructed the jury that plaintiff is not permitted to recover damages in this suit on account of

any injury caused by any continuation of the alleged conspiracy or the performance of any acts after May, 1966, when this suit was commenced (Instructions, p. 48). *Lawlor v. Loewe*, 235 U. S. 522, 536 (1915); *A. C. Becken Co. v. Gemex Corp.*, 314 F. 2d 839, 843 (7th Cir. 1963); *Flintkote Co. v. Lysfjord*, 246 F. 2d 368, 394-96 (9th Cir. 1957). We note that the time between contract termination and the institution of this action is very short. Plaintiff has not offered any specific evidence that post-termination impact was felt prior to May, 1966. The best evidence which we can glean from the record indicates that about half of plaintiff's alleged prospects (Nelson, McGibben, Saunders, Anderson, Lynn, Eichoff, Cleveland, and Block) became prospects only a relatively short time before trial in 1968 or in 1967 (Tr. 1118-23, 1127, 1129-31, 1133, 1136-38, 1181, 1265). At least as to these parties, no damages accrued prior to the institution of this action. This alone would diminish plaintiff's damage claim by approximately $80,300.

Secondly, plaintiff never claimed that any conspiracy between defendants was aimed at depriving it from obtaining aircraft to sell, but only that there was a conspiracy to deny authorized status to Fontana (Tr. 857-58). Yet aside from the general position taken by plaintiff that its status as an unauthorized Beechcraft dealer was competitively disadvantageous, plaintiff has not specifically demonstrated the relevance between such status and the loss of seventeen potential sales. What plaintiff did claim was that if it could have made a bid, then it had an excellent chance of making a sale (Tr. 322). However, plaintiff admitted that it never took advantage of a specific offer from at least one Beech distributor, Aviation Distributors, Inc., based in Pontiac, Michigan, to sell aircraft to it so that it could make its bids (Tr. 1322-23).

Thus, we do not agree with plaintiff that the fact of damage in the relevant post-cancellation period is self-

evident. The existence of the injury must be demonstrated with reasonable certainty, not supported just by "speculation and guesswork." *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U. S. 251, 264 (1946); *Flintkote Co.* v. *Lysfjord*, 246 F. 2d 368, 392 (9th Cir. 1957), *cert. denied*, 355 U. S. 835 (1957). Of course, once the "causal connection between defendant's wrongful act and some loss of anticipated revenue" is established, then the jury may make a reasonable estimate of the damages based on all relevant data and inferences. *Id.* However, our discussion is concerned not with the reasonableness of the jury's calculations, but with the fact that they thought an injury had been proved.

Reasonable certainty requires that the plaintiff meet its burden of "furnishing the best available evidence that the subject matter permits, as to what the impact of the claimed illegal conduct was on its business." *Riss & Co.* v. *Association of American Railroads*, 190 F. Supp. 10, 18 (D. D. C. 1960). In cases claiming loss of profits, three main types of evidence may be introduced: plaintiff's pre-conspiracy own records of business, records of comparative but unrestrained enterprises during the relevant period, and expert opinion as to these records. *Flintkote* v. *Lysfjord*, 246 F. 2d 368, 392 (9th Cir. 1957), *cert. denied*, 355 U. S. 835 (1957) cf. *Roseland* v. *Phister Mfg. Co.*, 125 F. 2d 417, 420 (7th Cir. 1942).

Plaintiff did not present evidence based on its or a competitors business records. Rather, it contends that Joseph M. Fontana's estimate of lost sales and profits with regard to the seventeen named prospects was competent proof, similar to that approved in *A. C. Becken Co.* v. *Gemex Corp.*, 272 F. 2d 1, 5 (7th Cir. 1959) and *William H. Rankin Co.* v. *Associated Bill Posters*, 42 F. 2d 152, 155 (2d Cir. 1930). In the latter case, however, plaintiff presented testimony as to pre-conspiracy profits. Its estimate of its lost profits "was proof of a kind as definite and certain

as the subject matter admitted." 42 F. 2d at 155. In the former case, plaintiff's estimate, which was supported by actual sales and profit data, was also considered to be the best available. 272 F. 2d 5.

That plaintiff did not present such historical or comparative data is not surprising when one considers that during 1963-1965, Fontana sold only two airplanes to only one customer (DX 37) and, at the end of 1965, had a retained earnings deficit of $32,471.62 (DX 34). Further, defendant Hartzog, which operated in an unfettered and open market, actually lost money since it began doing business in 1961 and specifically during the period from January, 1966, to June 1968 (Tr. 481-82). Plaintiff is undoubtedly correct in saying that the corporate aircraft market did not fully develop until after its dealer contract was cancelled. Yet, this just means that appropriate evidence of business trends should have been introduced as well. In any case, a change in the business climate does not excuse plaintiffs from presenting evidence of the business experience of another plane dealer nor does it explain how Fontana would have profited in this area when Hartzog, which averaged five sales a month, was operating at a loss.

Finally, in contrast to those cases where estimates and projections of business trends in the areas of sales or production are the best evidence available, plaintiff could have presented quite specific information concerning each of the seventeen potential sales for which it claims damages. Plaintiff could have deposed or called each prospect. Now plaintiff suggests that defendant could and should have interviewed or called these persons as well, but it was plaintiff and not the defendant which had the duty to prove its case. Further, and contrary to plaintiff's suggestion, it was in no way precluded by any of the defendants actions from showing with particularity that it stood

a chance of successfully dealing with some or all of the seventeen prospects. The failure of plaintiff to introduce the testimony of those parties who could best say whether or not Fontana had a real opportunity to sell them an airplane

> "is itself pursuasive that their testimony, if given, would have been unfavorable to (plaintiff). The production of weak evidence when strong is available can lead only to the conclusion that the strong would have been adverse. (Citation omitted.) Silence then becomes evidence of the most convincing character. (Citations omitted.) *Interstate Circuit* v. *United States*, 306 U. S. 208, 226 (1939).

We turn now to a consideration of Fontana's motion, as counterdefendant, for judgment notwithstanding the verdict as to Hartzog's counterclaim alternatively for a new trial. Hartzog, as counterplaintiff, complained that it was damaged because it made $5,000 infringement payment to Fontana. The jury awarded Hartzog $5,000 in damages. Fontana, as counterdefendant, argues that such a verdict is not sustained by the evidence or by law and that any loss suffered by Hartzog was the direct and proximate result of its own conduct.

The thrust of Fontana's position in this motion is not that it failed to receive a payment from Hartzog, but that such payment did not really injure Hartzog. Given that Fontana did receive this payment, it is clear that Fontana benefited from the infringement system. The converse is not necessarily true. That is, simply because Hartzog made a payment to Fontana does not mean that Hartzog was injured, for as counterdefendant suggests, Hartzog may have been a mere conduit. Indeed, it appears that this was the case, that both Fontana and Hartzog benefited from the infringement system, and that Gopher Aviation was the party who suffered an injury because it was required to

pay the infringement fee. In addition, as we have noted earlier, we find it somewhat inconsistent to offset Fontana's $1,000 loss with and its $5,000 gain under the infringement system, and then enforce a counterclaim based on that $5,000 gain.

In conclusion, with respect to count one, we have reviewed the evidence relative to each element of claimed damages. We have found that the overwhelming weight of the evidence, without regard to issues of credibility, indicates that plaintiff was not damages in the twenty-one instances discussed and, therefore, that the jury's verdict was in error. Defendants' motion for judgment notwithstanding the verdict is granted. Defendants' motion for a new trial is conditionally granted, should this judgment be vacated or reversed. Rule 50 (c), Fed. R. Civ. P. For the reasons stated in the opinion, the motion of plaintiff for judgment n. o. v. as to the counterclaim is also granted, and its alternative motion for a new trial is also conditionally granted.

Enter:

/s/ Abraham L. Marovitz.

Date: March 7, 1969.

ORDER.

(Filed March 10, 1968.)

This matter coming on to be heard on (1) motion of defendants, Beech Aircraft Corporation and Hartzog Schneck Aviation, Inc., pursuant to Rule 50 (b) of the Federal Rules of Civil Procedure to set aside the verdict of the jury with respect to Count 1 of the complaint and the judgment entered thereon, and to enter judgment for defendants, Beech Aircraft Corporation and Hartzog Schneck Aviation, Inc., and the alternative motion of defendants pursuant to Rule 59 of the Federal Rules of Civil Procedure for a new trial if their motion under Rule 50 (b) be denied or, if their motion under Rule 50 (b) be granted, that a new trial be conditionally granted pursuant to Rule 50 (c) of the Federal Rules of Civil Procedure; and (2) motion of plaintiff, Fontana Aviation, Inc., pursuant to Rule 50 (b) of the Federal Rules of Civil Procedure to set aside the verdict of the jury with respect to the counterclaim of defendant, Hartzog Schneck Aviation, Inc., and the judgment entered thereon, and to enter judgment for plaintiff, Fontana Aviation, Inc. and, alternatively, for a new trial, the Court having filed a memorandum opinion on March 7, 1969 with respect to the disposition of said motions, It Is Ordered:

1. That the motion of defendants, Beech Aircraft Corporation and Hartzog-Schneck Aviation, Inc., to set aside the verdict of the jury with respect to Count 1 of the complaint and the judgment entered thereon is granted, and said defendants' motion for judgment notwithstanding said verdict is granted, and it is, therefore, Ordered that the Clerk enter Judgment that the plaintiff take nothing, that the action be dismissed on the merits.

2. If the aforesaid judgment be vacated or reversed, then defendants' motion for a new trial is granted on the grounds set forth in the Court's memorandum opinion filed herein on March 7, 1969.

3. The motion of plaintiff, Fontana Aviation, Inc., to set aside the verdict of the jury with respect to the counterclaim of defendant, Hartzog Schneck Aviation, Inc., and the judgment entered thereon is granted, and its motion to enter judgment for plaintiff with respect to the counterclaim is allowed and it is, therefore, Ordered that the Clerk enter Judgment that defendant, Hartzog Schneck Aviation, Inc., take nothing with respect to said counterclaim, that said counterclaim be dismissed on the merits.

4. If the aforesaid judgment be vacated or reversed, then plaintiffs' motion for a new trial is granted on the grounds set forth in the Court's memorandum opinion filed herein on March 7, 1969.

Enter: A. L. Marovitz,
Judge.

Dated: March 10, 1969.

OPINION OF THE COURT OF APPEALS.

September 23, 1970.

Before KILEY, FAIRCHILD and PELL, *Circuit Judges*.

PELL, *Circuit Judge*. Fontana, appellant herein, is a Michigan corporation operating at an airport in Iron Mountain, Michigan, and engaged in the business of selling and servicing airplanes, as well as providing various flight connected services. Appellee, Beech, is a Deleware Corporation with its principal place of business in Kansas. It is engaged in the manufacture, distribution and sale of aircraft under the trade name "Beechcraft." Beech sell its planes through a nationwide network of twenty-four distributors who in turn sell largely to retail dealers although Beech at all material times involved owned and operated some distributor companies, which not only sold to independent dealers but also to the ultimate consumers.

The appellee, Hartzog, is an Illinois corporation located in Rockford, Illinois. It has been a Beechcraft distributor since 1961 and its territory included not only portions of Illinois but of several adjoining states including the upper peninsula of Michigan, in which Fontana was located. While Hartzog sold to independent dealers, it also sold directly to consumers through its wholly owned dealer company.

Fontana had been a Beechcraft dealer since 1946. Following Hartzog's becoming a Beechcraft distributor in 1961, Fontana purchased airplanes sold by it from Hartzog until the termination of the dealership by Hartzog in April 1966.

Subsequent to the termination, Fontana filed an anti-trust action against Beech and Hartzog alleging a conspiracy whereby the United States was divided into exclusive territories with each distributor having a separate territory and with distributors being restricted from competing in each other's territory; prices were fixed on the resale of new Beech aircraft; illegal demonstrator and stocking requirements were imposed on independent dealers and restriction was made on the sale of a new model aircraft known as the King Air Model to distributor organizations or their wholly owned dealer companies. Fontana claimed that its dealer contract was cancelled by Hartzog pursuant to the alleged conspiracy when Fontana refused to acquiesce in territorial, stocking and airplane model restrictions and that Fontana, subsequently, was unable to secure a dealership from other distributors.

While there was some dispute between the parties on this appeal as to various evidentiary matters, there was testimony adduced in the district court to support a jury finding that the factual situation is the following.

Prior to 1966, Beech's contracts with its distributors, and the contract that Beech distributors had with their dealers, contained limitations upon the sale of airplanes outside the distributors' or dealers' "territory." There were provisions for interterritorial financial adjustments if such sales outside the territory took place. Further, these territorial limitations had been the subject of discussion between Beech and its distributors. These discussions ordinarily occurred at meetings of the Beech distributor advisory council which met and discussed mutual problems. The council included the president of Hartzog and the meetings were attended by officials of Beech. In February 1964, the minutes of the council indicated that there had been concern expressed at legal ramifications

of the portion of the contract dealing with the territorial restrictions.

During the period of 1961 to 1966, Fontana had made one payment of $1000 to a distributor for an out of territory sale and had received through Hartzog one half, or $5000, of the amount paid by another distributor for a sale within the Hartzog Fontana territory.

In 1966, Beech's standard distributor contract was amended. The provision pertaining to financial adjustments following out of territory sales was eliminated. There was a provision that the distributor agreed to appoint and establish "in its area of responsibility" the minimum number of authorized Beecheraft dealers required to secure adequate penetration. It appears that under the 1966 agreements a distributor could not appoint a dealer in another distributor's area of responsibility. Early in 1966, when the corporate class plane market was just beginning to develop, representatives of Fontana and Hartzog met, at which time Fontana indicated it wanted a dealer contract which would permit it to sell the relatively new King Air without being required to purchase and stock the entire line of Beech planes necessary to obtain a twenty percent discount. Hartzog replied that Fontana should confine its sales efforts to single engine and light twin planes only and that it would not receive a contract permitting it to sell King Air. Fontana indicated it would attempt to secure a direct dealership from Beech. Hartzog replied that if it did so Hartzog would cancel Fontana's contract. Subsequently, Fontana unsuccessfully attempted to secure a direct dealership from Beech, which declined to deviate from its established marketing setup through distributors. Thereafter, Hartzog terminated the Fontana dealership contract as of April 15, 1966. Subsequently, Fontana

sought to secure an authorized dealership from two other distributors, one located in Pontiac, Michigan, and one located in Rochester, Minnesota. These distributors, after checking with Beech, declined to enter into a dealership contract with Fontana.

Fontana claimed that after cancellation it had seventeen excellent prospects for purchase of Beech aircraft. During the trial of the cause below, Fontana, after objections by the defendants, was limited in its damage estimate, insofar as post-cancellation damages were concerned, to the seventeen named prospects.

In addition to the post-cancellation damages, Fontana claimed damages resulting from three precancellation situations. One was that it received only a ten percent dealer discount on sales of Baron and Travel Air Plane sales instead of the twenty percent discount because of its not stocking certain Beech aircraft required by the dealer contract. Secondly, Fontana contended it was improperly confined to a sales agent commission of $12,500 on a King Air sale originated by it instead of the twenty percent discount it would have received in the absence of the restrictions contained in the Hartzog contract. Thirdly, Fontana contended it was entitled to reimbursement of a $1,000 penalty paid by it to a Kentucky distributor for an out-of-territory sale.

As may be needed in the development of this opinion, further specific reference to the factual situation appearing in the evidence will be brought out in connection with the examination of the applicable law.

Following a five week jury trial, a verdict was returned in favor of Fontana in the amount of $150,000, on which the court entered judgment in the trebled amount of $450,000, together with costs and attorneys' fees. Thereafter, pursuant to defendants' motion, the district court

vacated the treble damage judgment and entered judgment for the defendants notwithstanding the verdict. The court in addition conditionally granted a new trial "should this judgment be vacated or reversed." Fontana instituted the present appeal from the court's action.

During the course of the proceedings, Hartzog had filed a counterclaim for $5,000 because of the $5,000 territorial infringement payment made to Fontana during the course of its dealership. The jury awarded Hartzog $5,000 on the counterclaim. The district court also entered judgment, notwithstanding the verdict, on the counterclaim and dismissed the counterclaim on the merits. Hartzog likewise filed an appeal.

The district court judge in an apparent partial reliance on the then recently decided case of *United States v. Container Corporation of America*, 393 U. S. 333 (1969), stated in his memorandum opinion, "[W]e will assume, but not decide, that defendants are guilty of antitrust violations." The district court in part also apparently rested its decision on its ultimate determination that there was no fact of damage shown by Fontana, thereby enabling the court to dispose of the motion for judgment notwithstanding the verdict without regard to a determination of the antitrust issue. The granting of the new trial conditionally was predicated on the same grounds supporting the granting of the motion for judgment n.o.v., presumably that there was no fact of damage. There is no indication in the court's memorandum opinion or order that the new trial was conditionally granted because of a failure to prove an antitrust case.

The result which we will reach in this opinion is that the judgment notwithstanding the verdict was erroneous. However, we will also, as we may do, review the conditional order of the trial court, made pursuant to Rule

50(b), FRCP, granting a new trial. 3 Barron & Holtzoff-Wright, Federal Practice and Procedure § 1302.1, p. 346 (1958).

Inasmuch as the district court did not reach a final decision on whether a judgment notwithstanding the verdict should have been granted insofar as antitrust issues were concerned, and inasmuch as further proceedings in the court below following the remand may involve consideration of whether to grant a motion for a judgment notwithstanding the verdict, on the antitrust issue, we deem it necessary to turn to that issue as a threshold question.

In so doing, we are not deciding whether the weight of the evidence does or does not support an antitrust violation. We are not weighing the evidence but only inquiring as to whether there is any substantial evidence which would support a verdict, for if there was then a motion for judgment notwithstanding the verdict insofar as the antitrust issue was concerned should have been overruled. 2B Barron & Holtzoff-Wright, Federal Practice & Procedure § 1075, pp. 384-85 (1961).

There was evidence at the trial below supportive of a conspiracy in violation of the Sherman Act. Tests for determination of such a violation were laid down in *American Tobacco Co.* v. *United States*, 328 U. S. 781 (1946), in which the court stated the following (at 809-10):

> "It is not the form of the combination of the particular means used but the result to be achieved that the statute condemns. It is not of importance whether the means used to accomplish the unlawful objective are in themselves lawful or unlawful . . . . No formal agreement is necessary to constitute an unlawful conspiracy . . . . The essential combination or conspiracy in violation of the Sherman Act may be found in a course of dealing or other circumstances as well as in an ex-

> change of words . . . . Where the circumstances are such as to warrant a jury in finding that the conspirators had a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement, the conclusion that a conspiracy is established is justified."

There was evidence in the case before us on which the jury reasonably could have found that for the purpose of lessening competition a rigid territorial division had been worked out on a horizontal basis between the various distributors with the tacit approval of Beech, which also participated therein through its own distributor companies.

There was evidence from which the jury could have found that this arrangement continued up to the 1966 standard agreement coming into effect. If Beech, in good faith, had eliminated unlawful antitrust aspects of its marketing arrangements by the 1966 contract then, of course, the conspiracy violative of the Sherman Act would have also ceased and the company should not be penalized for its efforts to set its house in order. On the other hand, window dressings and changes of words in contracts are not controlling. The matter is one of substance and not form.

Agreements or arrangements providing for an aggregation of trade restraints are violative of the act; nor can the restraints of trade be justified as reasonable steps taken to implement a valid trademark licensing system. *Timken Roller Bearing Co.* v. *United States*, 341 U. S. 593, 598 (1951).

The defendants contend that a manufacturer is free to agree with his vendee in a particular geographic area that he will sell to no others in that area. The Supreme Court, although not deciding the difference in impact, did in *White Motor Co.* v. *United States*, 372 U. S. 253 (1963), recognize a possible distinction between territorial restrictions aris-

ing out of a vertical arrangement as opposed to one of a horizontal nature. Nevertheless, Mr. Justice Brennan in concurring stated at p. 267:

> "If it were clear that the territorial restrictions involved in this case had been induced solely or even primarily by appellant's dealers and distributors, it would make no difference to their legality that the restrictions were formally imposed by the manufacturer rather than through inter-dealer agreement."

While the case before us would scarcely seem to be that of the tail wagging the dog, such as apparently was involved in *United States* v. *Sealy, Inc.*, 388 U. S. 350 (1967), there was sufficient evidence for the jury's consideration of concerted horizontal action, participated in by Beech.

United States v. *Arnold, Schwinn & Co.*, 388 U. S. 365 (1967), held that territorial limitations on resales by distributors, where the distributors own the goods were violative of the antitrust laws. In the case before us, the comparable situation existed in which the practical effect was that only one distributor could enter into an authorized dealership arrangement with Fontana.

While the law recognizes that a manufacturer, in the battle for business, has a right to sell to whom he pleases, this right is neither absolute nor exempt from regulation. If it is accompanied by unlawful conduct or agreement, or conceived in monopolistic purpose or market control, the right is deemed to have transgressed the act. *A. C. Becken Co.* v. *Gemex Corp.*, 272 F. 2d 1 (7th Cir. 1959).

While we have here primarily concerned ourselves with the restraint on out-of-territory dealer appointments, we find adequate supportive evidence in the overall pattern of operation on which to base a verdict with regard to the other matters of complaint by Fontana, being the stocking requirement and the restraint on sale of King Airs. All of

these matters could well have been found by the jury as having been conceived as a part of an illegal market control.

Upon the basis of the foregoing, we hold therefore that the district court should not have granted a judgment notwithstanding the verdict on the antitrust issue. However, unlike the motion for judgment n.o.v., the matter of granting a new trial is to be determined in the sound discretion of the trial court. 6A Moore, Federal Practice ¶ 59.08 [5], p. 3816 (1966). Deference must be given to decisions of the trier of the fact who is usually in a superior position to appraise and weigh the evidence, *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U. S. 100, 123 (1969), which is a deference which should also be accorded to the trial judge in a jury case, he having heard and lived with the evidence during a lengthy trial. On remand, the district court should determine prior to a new trial whether the antitrust issue should again be presented to the jury or whether a new trial should be confined to the issue of damages.

As previously indicated herein, the district judge in granting judgment n.o.v. did so on the basis of lack of proof of the fact of damage. The damage question in private antitrust suits is composed of two components: the fact of damage—injury to plaintiff's business resulting from the alleged illegal conspiracy—and the amount of damages. Once the fact is established, uncertainty concerning the exact amount of loss will not preclude recovery.

> "The rule which precludes the recovery of uncertain damages applies to such as are not the certain result of the wrong, not to those damages which are definitely attributable to the wrong and only uncertain in respect of their amount." *Story Parchment Co.* v. *Paterson Co.*, 282 U. S. 555, 562 (1931).

In *Zenith Radio Corp. v. Hazeltine Research, Inc.*, supra at p. 114 n. 9, the Supreme Court characterized plaintiff's burden on the critical fact of damage issue as follows:

> "Zenith's burden of proving the fact of damage under § 4 of the Clayton Act is satisfied by its proof of some damage flowing from the unlawful conspiracy; inquiry beyond this minimum point goes only to the amount and not the fact of damage. It is enough that the illegality is shown to be a material cause of the injury; a plaintiff need not exhaust all possible alternative sources of injury in fulfilling his burden of proving compensable injury under § 4."

As the Supreme Court further pointed out in *Zenith* (at p. 123) "damage issues in these cases are rarely susceptible of the kind of concrete, detailed proof of injury which is available in other contexts."

The basis of the trial court's order granting the judgment n.o.v. was its conclusion that the evidence was overwhelmingly and conclusively against the jury's determination that plaintiff had shown the fact of damage. Our examination of the record convinces us the trial court erred in this conclusion. Fontana's major claim of damage was the alleged loss of sales to certain identified prospects due to the cancellation of its status as a Beech authorized dealer.

Fontana contended that there was supportive evidence that all of the prospects already owned planes and that they had business needs for executive aircraft as well as having some business connection in the Iron Mountain, Michigan region.

Fontana had previously sold planes to and done service work for some of the prospects and a number of the prospects subsequently did purchase aircraft.

Fontana's evidence upon damages was based almost solely upon opinion testimony of its 26 year old Board

Chairman. The testimony was such that if we were weighing the evidence we would find this rather weak, but as we have already stated we are not here weighing the evidence. The fact is that, over objection, the officer of Fontana was permitted to testify and to give his opinion regarding the loss of sales to the seventeen prospects. There is no indication in the record that the court struck the testimony as being speculative or conjectural or that the entry of the judgment n.o.v. was based upon this premise. The trial judge's memorandum opinion specifically stated that it was without regard to issues of credibility.

While proof of loss by the particular method adopted by Fontana does not meet the ordinary standards, *see Pinkote Company* v. *Lustfoyd*, 246 F. 2d 368, 392 (9th Cir.), cert. den. 355 U. S. 835 (1957), the circumstances of plaintiff's business and the developing corporate airplane market did not present the usual situation. Actually, the testimony showed that plaintiff's business prior to the termination of the Beechcraft contract had been operating at a deficit. Apparently in this respect Fontana would have been limited to showing that the deficit was even greater after the loss of the Beechcraft dealership. Nevertheless, the evidence was in, and remained in, and while its weight may be extremely questionable, we cannot say now that, for the purpose of considering the correctness of the ruling on the judgment notwithstanding the verdict, it should have been disregarded.

On the retrial of this cause the court may well desire to determine the admissibility of this type of evidence.

Over and above this aspect of the matter, we are in a day and age in which the value of the nationally advertised franchise is a matter of general recognition. If Fontana were deprived of the dealership (or franchise right) as a result of an illegal conspiracy, some damage would appear

to be implicit. Beech's Vice President conceded that Fontana would be at a competitive disadvantage in attempting to sell new Beech airplanes after the loss of its authorized dealer status.

Insofar as the ruling on the judgment n.o.v. was concerned, the fact that the alleged illegality put plaintiff at a competitive disadvantage in competing for the business of a number of identified prospects was adequate to make erroneous the ruling on the motion for judgment n.o.v. If there were other possible causes of plaintiff's inability to sell new Beech airplanes to the apparently sound prospects, it would appear that the defendants were under obligation to go forward with evidence to that effect and Fontana "was not required in the first instance to prove the absence of all other conceivable causes." *American Cooperative Serum Ass'n* v. *Anchor Serum Co.*, 153 F. 2d 907, 912 (7th Cir. 1946).

As to the contention by Hartzog and Beech that plaintiff could have obtained new Beech aircraft from Beech distributors even without an authorized dealer status, problems existed. Beech's Vice President tacitly admitted that this theoretical possibility was not a practical solution when he testified to the many technical services that are available only to authorized Beech dealers and conceded that an unauthorized dealer would be at a competitive disadvantage.

Further there was evidence that the plaintiff did attempt to compete in this manner on at least two separate occasions but unsuccessfully so. Fontana was not bound to make repeated requests for airplanes from Beech distributors or to exhaust every possible avenue to avoid the effects of defendant's alleged illegal activity but could maintain an action for an injury which flows naturally and expectedly from such activity. *Zenith*, *supra*, at p. 114 n. 9; *Continental*

Ore Co. v. *Union Carbide & Carbon Corp.*, 370 U. S. 690, 696-702 (1962).

In the district court's memorandum opinion it was stated that about half the prospects came to plaintiff only after the filing of this action and damages related to them were not recoverable. The determination of the trial court in this respect is erroneous even on the amount of damage issue. It is clear that some post-filing damages may be recovered in antitrust suits. Where the alleged damages are the result of acts occurring prior to the filing of the complaint, there can be no doubt that they may be recovered even though they may have accrued following such filing. *Lawlor* v. *Loewe*, 235 U. S. 522, 536 (1915) and *Reckon Co.* v. *Gemex Corp.*, 314 F. 2d 839, 842-43 (7 Cir. 1963). In the instant case the alleged damages resulted from plaintiff's inability to compete. The cause of that inability to compete was the single act of defendants, occurring before the filing of the complaint, in depriving plaintiff of his authorized dealer status.

The trial court's decision and defendants' argument also rely heavily on the fact that plaintiff did not call any of the prospects to testify. Indeed, one prospect was called by the defendants and negatived the testimony of Fontana's Board Chairman. This undoubtedly weakened plaintiff's case and the jury may well not have accepted the Fontana witness' assertion as to some of the alleged prospects and may have reduced the damage award accordingly. Apparently this is what happened, for the jury award is substantially less than the amount plaintiff asserted as its damages.

What we have said is sufficient to indicate the error of the trial court in finding that the evidence on the fact of damage issue was overwhelmingly and conclusively against Fontana. Once there is sufficient evidence of the

fact of damage to go to the jury, the assessment of the amount is largely a matter of the jury's consideration of all the evidence. *Bigelow* v. *RKO Radio Pictures*, 327 U. S. 251, 264 (1946).

In its memorandum opinion the district court dealt in seriatim fashion with each of plaintiff's alleged items of damage and concluded that the evidence supported none of them. Of this approach, the Supreme Court has said:

> "We think this was improper. In cases such as this, plaintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each. '. . . [T]he character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole. *United States* v. *Patten*, 226 U. S. 525, 544 . . . ; and in a case like the one before us, the duty of the jury was to look at the whole picture and not merely at the individual figures in it.' *American Tobacco Co.* v. *United States*, 147 F. 2d 93, 106 (C. A. 6th Cir.). See *Montague & Co.* v. *Lowry*, 193 U. S. 38, 45-46." *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U. S. 690, 698-99, (1962).

We need not stop to deal with each of the damage claims and the court's treatment of them. In each case, the court apparently felt that plaintiff had introduced competent evidence in support of the claim but found that other evidence defeated the claim. Since the court in its discretion was satisfied in the event the judgment notwithstanding the verdict was not upheld that an adequate basis for a new trial existed, at least on the question of damages, we will not disturb that exercise of his discretion. The evidence under proper rules of admissibility will go to the jury and the jury will be in a position

to exercise its prerogative to weigh the evidence in fixing the amount of plaintiff's damages.

We affirm the action of the trial court in granting judgment notwithstanding the verdict insofar as the $5,000 judgment on the counterclaim of Hartzog is concerned. If there was any injury resulting from a violation of the Sherman Act involved in the particular transaction, it was another distributor which suffered the injury, not Hartzog.

For the reasons herein set forth, judgment of the trial court in granting a judgment notwithstanding the verdict is reversed and this cause is remanded to the district court for further proceedings not inconsistent herewith.

REVERSED.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

Wednesday, September 23, 1970

Before

HON. ROGER J. KILEY, Circuit Judge
HON. THOMAS E. FAIRCHILD, Circuit Judge
HON. WILBUR F. PELL, JR., Circuit Judge

FONTANA AVIATION, INC., a Corporation,
Plaintiff-Appellant,

No. 17734 vs.

BEECH AIRCRAFT CORPORATION, a Corporation, and HARTZOG-SCHNECK AVIATION, INC., a Corporation,
Defendants-Appellees.

HARTZOG-SCHNECK AVIATION, INC.,
Counter-Claimant-Appellant,

No. 17735 vs.

FONTANA AVIATION, INC.,
Counter-Defendant-Appellee.

} Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the action of the said District Court granting judgment notwithstanding the verdict insofar as the $5,000 judgment on the counterclaim of Hartzog is concerned be, and the same is hereby, AFFIRMED.

It is further ordered and adjudged by this Court that the judgment of the said District Court granting a judgment notwithstanding the verdict be, and the same is hereby, REVERSED, and that this cause be, and it is hereby, REMANDED to the said District Court for further proceedings not inconsistent with the opinion of this Court filed this day.

It is further ordered and adjudged by this Court that the costs in these appeals be taxed in favor of Pontana Aviation, Inc. and against Beech Aircraft Corporation and Hartzog Schmeck Aviation, Inc.

APPENDIX C.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

October 19, 1970

Before

HON. ROGER J. KILEY, Circuit Judge
HON. THOMAS E. FAIRCHILD, Circuit Judge
HON. WILBUR F. PELL, JR., Circuit Judge

FONTANA AVIATION, INC., a Corporation,
Plaintiff-Appellant,

No. 17734 vs.

BEECH AIRCRAFT CORPORATION, a Corporation, and HARTZOG-SCHNECK AVIATION, INC., a Corporation,
Defendants-Appellees.

HARTZOG-SCHNECK AVIATION, INC., a Corporation,
Counter-Claimant-Appellant,

No. 17735 vs.

FONTANA AVIATION, INC., a Corporation,
Counter-Defendant-Appellee.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

ORDER.

Defendants, Beech Aircraft Corporation and Hartzog Schmeck, Inc., have moved this court for a rehearing and reconsideration of our judgment in Appeals Nos. 17734 and 17735 insofar as it taxed all costs of the appeals to them.

Plaintiff, Fontana Aviation, Inc., prevailed in Nos. 17734 and 17735 as to the trial court's grant of Judgments N. O. V. Beech prevailed in No. 17734 as to the trial court's conditional grant of a new trial.

Having considered the petition for rehearing, the response and the reply, we now dispose of the issue so raised by amending the judgment in appeals Nos. 17734 and 17735 on the matter of costs only as follows:

It is hereby ordered and adjudged that the costs of the appendix be taxed 80% to Beech Aircraft Corp. and Hartzog-Schmeck, Inc. and 20% to Fontana Aviation, Inc. with credit to be allowed on the payment of said costs for the payment heretofore made by Beech Aircraft Corp. on said appendix. Each of the parties shall otherwise bear its own costs of appeal including the costs of briefs.

Such an assessment reflects, in our opinion, the relative importance in these appeals of the issues on which each party prevailed. Further, we are not unmindful of the difficulties of successfully appealing the granting of a motion for a new trial and do not know, if this had been all that was involved, that Fontana would have appealed.

IT IS SO ORDERED.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

FONTANA AVIATION, INC., A Corporation, *Petitioner*,

v.

BEECH AIRCRAFT CORPORATION, A Corporation, and HARTZOG-SCHNECK AVIATION, INC., A Corporation, *Respondents*.

BRIEF FOR RESPONDENT BEECH AIRCRAFT CORPORATION IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 947

FONTANA AVIATION, INC., A Corporation, *Petitioner*,

v.

BEECH AIRCRAFT CORPORATION, A Corporation, and HARTZOG-SCHNECK AVIATION, INC., A Corporation, *Respondents*.

BRIEF FOR RESPONDENT BEECH AIRCRAFT CORPORATION IN OPPOSITION

QUESTION PRESENTED

Whether the Court of Appeals erred as a matter of law in declining to disturb the trial court's discretionary grant of a new trial in the particular circumstances of this case.

STATEMENT[1]

This is an antitrust case, brought by petitioner, a former retail dealer in Beechcraft airplanes, against Hartzog-Schneck Aviation, Inc. (Hartzog), a whole-

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[1] There are a substantial number of factual inaccuracies both in petitioner's description of the "antitrust violations" and in its discussion of "the fact and amount of damage." Because most of these are not germane to the only real issue presented by the petition, they will not be discussed in this brief.

sale distributor, and Beech Aircraft Corporation (Beech), the manufacturer of Beechcraft airplanes. Petitioner sought treble damages on the basis of injuries it allegedly suffered as a consequence both of its treatment by Hartzog, including Hartzog's refusal to continue contractual relations with it, and of petitioner's subsequent failure to secure an authorized Beechcraft dealership from another wholesale distributor.

Although petitioner had shown itself remarkably unsuccessful in the sale of Beechcraft airplanes,[2] to the point that it accumulated a substantial earnings deficit during the period in which it held contracts to sell such aircraft,[3] the jury awarded damages of $150,000. The award was necessarily premised chiefly upon petitioner's assertion that, notwithstanding its persistent inability to sell aircraft during its dealership, it would, had the dealership not been terminated, have sold a large number of aircraft in the period immediately following its termination.[4] This assertion was,

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[2] In the last three calendar years prior to the termination of its dealership, petitioner participated in the sale of only two Beechcraft airplanes, both of them to a single customer. (Record 1858-59). The customer's interest in the larger of these airplanes was aroused, not by petitioner, but by Beech itself. *Id.* at 786).

[3] At the end of 1965, three and one-half months before petitioner's dealership contract was not renewed, it had suffered a cumulative loss of $32,471.62. (Record 1837-1839).

[4] Petitioner advanced various other claims involving situations arising before its dealership contract was not renewed. It asserted that it was entitled to the recovery of a penalty paid on an out-of-territory sale, that it had received an improperly small discount as to certain sales, and that it had in one case received an inappropriately small commission. These claims collectively amounted to only $69,000.

as the court below noted, "based almost solely upon opinion testimony of [petitioner's] 26 year old Board Chairman." (Petition, pp. A27-A28). Petitioner's Board Chairman averred that, but for the dealership's termination, it would have sold aircraft to some seventeen "prospects," each of which allegedly had requested demonstrations or price quotations. Petitioner elected neither to call at trial nor to proffer the deposition testimony of any of these seventeen "prospects" not one of whom was shown by petitioner to have bought from another source an airplane comparable to any of those that petitioner had previously sold at a price equivalent to or more than that which petitioner claimed it would have charged.[5] The Court of Appeals, with uncommon restraint, characterized this testimony as "rather weak" and observed that "its weight may be extremely questionable." (Petition, p. A28) The court added that upon retrial the District Court "may well desire to determine the admissibility of this type of evidence." (*Ibid.*)

Respondents moved for judgment notwithstanding the verdict and alternatively for a new trial. The ground stated for the motion for judgment n.o.v. was that there was insufficient evidence either of a statutory violation affecting petitioner or of injury to petitioner's business or property in a measurable amount to support a verdict for petitioner. Among the grounds presented for a new trial was the proposition that the verdict, both in determination of liability and

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[5] One of the seventeen, who was within the range of compulsory process, was called by respondents. As the Court of Appeals observed, the testimony of this "prospect" directly "negatived the testimony of Fontana's Board Chairman." (Petition, p. A30)

in amount of assessed damages, was contrary to the clear weight of the evidence, and would, if permitted to stand, result in a miscarriage of justice.

The trial court found it unnecessary to resolve the question whether it should, in the exercise of its discretion, award respondents a new trial because the determination of liability was against the clear weight of the evidence, or because it was based in whole or in part on false evidence, or because it would, if permitted to stand, otherwise result in a miscarriage of justice. It ruled that respondents were entitled to judment n.o.v. because, even assuming *arguendo* that an antitrust violation had been established, petitioner had failed to present evidence on the question of damages adequate to support a jury verdict in its favor. Based upon the state of the record on this same issue, the court also exercised its discretion to grant, in the alternative, a new trial.

The Court of Appeals reviewed the evidence on damages, found that it was not "overwhelmingly and conclusively" (Petition, p. A30) against petitioner, and accordingly ruled that the trial court erred in its award of judgment to respondents notwithstanding the judgment. It declined, however, to disturb the trial court's order that respondents should alternatively be granted a new trial. In addition, the Court of Appeals examined an issue not reached by the trial court: whether respondents should be awarded either judgment n.o.v. or a new trial on the question of the existence of an antitrust violation. It held that although judgment n.o.v. on this issue would have been inappropriate, the trial court "should determine prior to a new trial whether the antitrust issue should again

be presented to the jury or whether a new trial should be confined to the issue of damages." (Petition, p. A26) The case was ordered to be remanded to the District Court.

ARGUMENT

Nothing in this case properly warrants the attention of this Court. The only real issue presented, whether the District Court's order of a new trial was a permissible exercise of its discretion under Rule 59, is patently inappropriate for review by certiorari. It is well settled that the granting of a new trial is a "matter resting in the sound discretion of the trial judge," and that its judgment as to this issue is not reviewable even by an intermediate appellate court "save in the most exceptional cases." *Silvestri* v. *Kramer*, 314 F.2d 407, 413 (3d Cir. 1963). See also *Montgomery Ward & Co.* v. *Duncan*, 311 U.S. 243, 254 (1940); 6A Moore, Federal Practice ¶ 59.08 [5], p. 3820. Correspondingly, this Court has repeatedly held that certiorari should not issue to review an interlocutory order, including an order granting a new trial, "unless it is necessary to prevent extraordinary inconvenience and embarrassment." *American Construction Co.* v. *Jacksonville Railway*, 148 U.S. 372, 384 (1893). See also *Hamilton Shoe Co.* v. *Wolf Brothers*, 240 U.S. 251, 257-258 (1916); *Cobbledick* v. *United States*, 309 U.S. 323, 324-325 (1940); *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327 (1967) (denying petition for certiorari on ground case not ripe for review). Such a lack of finality alone furnishes "sufficient ground" for the denial of certiorari. *Hamilton Shoe Co.* v. *Wolf Brothers*, *supra* at 258. Here, as in *Brotherhood of Locomotive Firemen* v.

Bangor & Aroostook R.R., supra, "because the Court of Appeals remanded the case, it is not yet ripe for review by this Court." *Id.* at 328.

This is not a matter merely of procedural fastidiousness. "Finality as a condition of review is an historic characteristic of federal appellate procedure. It was written into the first Judiciary Act and has been departed from only when observance of it would practically defeat the right to any review at all." *Cobbledick* v. *United States, supra* at 324-325. Indeed, the finality principle has been styled a "cornerstone" of appellate procedure, F. James, Civil Procedure 51 (1965), indispensable both to avoid "enfeebling judicial administration" and to achieve a "healthy legal system." *Cobbledick* v. *United States, supra* at 325, 326.

Petitioner's efforts to escape the application of these principles are altogether unpersuasive. There is not the slightest basis for petitioner's suggestion that there has been some "usurpation" by the trial court of the jury's functions. It is clearly settled that a trial court may in its sound discretion set aside a verdict as contrary to the preponderance of the evidence. See, for example, *Montgomery Ward & Co.* v. *Duncan, supra* at 254; *Silverii* v. *Kramer, supra* at 413; *Aetna Casualty & Surety Co.* v. *Yeatts,* 122 F.2d 350, 352-353 (4th Cir. 1941); 6A Moore, Federal Practice ¶ 59.08 [5]. It is established no less plainly that a verdict may be set aside as against the weight of the evidence even if the state of that evidence is not such as to permit the entry of judgment n.o.v. See, for example, *Montgomery Ward & Co.* v. *Duncan, supra* at 254; *Aetna Casualty & Surety Co.* v. *Yeatts, supra* at 352-353; *Simpson* v. *Skelly Oil Co.,* 371 F.2d 563 (8th Cir.

1967); *Planters Mfg. Co.* v. *Protection Mut. Ins. Co.*, 380 F.2d 869 (5th Cir. 1967); Moore, *supra* at 3816-3819. Neither the Seventh Amendment[6] nor the cases adduced by petitioner[7] are inconsistent with these familiar rules. The result reached below represents, not usurpation of the jury's functions, but the application of well-settled principles by which a trial court, exercising sound judicial discretion, may act to prevent a miscarriage of justice.

Petitioner's remaining contention, that the new trial order was premised upon a mistake of law, is equally insubstantial. Petitioner has evidently misconceived

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[6] Not surprisingly, petitioner offers no argument to support its suggestion that the result below is inconsistent with the requirements of the Seventh Amendment. Nothing is more clearly settled than that the authority of a trial court to grant a new trial under Rule 59 is entirely consonant with the terms of the Seventh Amendment. See, for example, Capital Traction Co. v. Hof, 174 U.S. 1 (1899); Fairmont Glass Works v. Cub Fork Coal Co., 287 U.S. 474 (1933); Cone v. West Virginia Pulp & Paper Co., 330 U.S. 212 (1947); 6A Moore, Federal Practice ¶ 59.05[2], p. 3735.

[7] The cases offered by petitioner are entirely inapposite. In three of the cases, the verdict was set aside, not by the trial court, but by the Court of Appeals. Continental Ore Co. v. Union Carbide Corp., 370 U.S. 690 (1962); Bigelow v. RKO Radio Pictures, 327 U.S. 251 (1946); Perkins v. Standard Oil Co., 395 U.S. 642 (1969). In the fourth, neither lower court set aside the verdict, and the issue was simply the petitioner's challenge to the sufficiency of the evidence upon which the verdict was based. Eastman Kodak Co. v. Southern Photo Materials Co., 273 U.S. 359, 375 (1927). In none of the cases did this Court purport to restrict the trial court's discretionary authority under Rule 59 to set aside a verdict as contrary to the clear preponderance of the evidence. Petitioner has thus extracted isolated dicta from inapposite cases, and sought to construct from them support for a proposition not involved in those cases and directly inconsistent with numerous other decisions of this Court.

the character both of the trial court's order and of the Court of Appeals' judgment. The District Court held that the verdict should be set aside because it was contrary to the "overwhelming weight of the evidence." (Petition, p. A15). The Court of Appeals found petitioner's evidence as to damages "rather weak" and of "extremely questionable" weight (*Id.*, p. A28), but it nonetheless held that the evidence was not so "overwhelmingly and conclusively" (*Id.*, p. A30) against petitioner as to support a judgment for respondents notwithstanding the verdict. In these circumstances, it quite properly declined to disturb the trial court's conclusion that it would be a miscarriage of justice to permit the verdict for petitioner to stand. The two courts were divided, not by issues of law, but by somewhat different assessments of the relative flimsiness of petitioner's evidence. The portions of the opinion below in which petitioner purportedly discovers "issues of law" reflect merely the differing view taken by the Court of Appeals of the weight of various items of petitioner's evidence. If, as petitioner now asserts, these differing views as to the weight of evidence are "issues of law," every new trial order based upon evidentiary grounds would necessarily and inevitably fall with the reversal of an accompanying judgment n.o.v. This plainly is not the law. *Compare Simpson* v. *Skelly Oil Co., supra; Planters Mfg. Co.* v. *Protection Mut. Ins. Co., supra; Bennett* v. *D.C. Transit System, Inc.*, 298 F.2d 325 (D.C. Cir. 1962); *Moist Cold Refrigerator Co.* v. *Lou Johnson Co.*, 249 F.2d 246 (9th Cir. 1957).

The simple fact is that there here exists no basis either for any exception to the finality principle or, even apart from the question of finality, for review by

certiorari. There is nothing in this case that places it among those "exceptional" cases, *American Construction Co.* v. *Jacksonville Railway, supra* at 384, in which review of an interlocutory order has been permitted.[8] Whatever their importance to the parties, the issues presented in this litigation are neither novel nor of general significance. The question whether the trial court permissibly decided that there should be a new trial of an altogether ordinary treble damage action cannot conceivably be supposed "too important to be denied review * * *." *Compare Cohen* v. *Beneficial Loan Corp.*, 337 U.S. 541, 546 (1949). See also *Hamilton Shoe Co.* v. *Wolf Brothers, supra* at 257. And, despite petitioner's allegations, there is no conflict between the result reached below and the prior judgments either of this Court or of the other courts of appeals.[9]

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[8] The contrast between this case and those in which such review has been permitted is marked. In American Construction Co. v. Jacksonville Railway, *supra*, for example, the Court was prepared to review an interlocutory order only if a show cause proceeding first established that the decree of the lower court was void because one of the sitting judges was disqualified. *Id.* at 387. In other cases, review has been permitted because of a jurisdictional issue, the resolution of which was fundamental to the further conduct of the case. See, for example, Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 52 (1938); Larson v. Domestic and Foreign Commerce Corp., 337 U.S. 682, 685, n. 3 (1949). This Court has, in other words, employed criteria that correspond closely to those incorporated in the Interlocutory Appeals Act, 28 U.S.C. § 1292(b), by which district courts may certify to the courts of appeals for immediate resolution "a controlling question of law," as to which there is substantial ground for disagreement and the immediate resolution of which may materially advance the termination of the litigation. Nothing here can be thought to approach those criteria.

[9] On the contrary, as shown by cases which petitioner itself cites, the courts of appeals in appropriate circumstances in antitrust cases have themselves granted new trials or have left undisturbed district court grants of new trials, and this Court has declined

Petitioner would entangle this Court in an intensely factual revaluation of the sufficiency of its evidence as to damages, contrary to well-settled rules of ripeness and without even a colorable claim that this litigation satisfies the customary standards for review by certiorari. The consequence would be an obvious misallocation of this Court's limited resources and a repudiation of the trial court's discretionary authority under Rule 59 to grant or deny new trial motions. This case should instead be returned to the District Court, where that court may, after having first determined the proper limits of the new trial in accordance with the instructions of the Court of Appeals, submit the evidence to the jury "under proper rules of admissibility." (Petition, p. A31)[10]

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itself to review such action (Florists' Nationwide Telephone Network v. Florists' Telegraph Delivery Association, 371 F.2d 263 (7th Cir.), *cert. denied*, 387 U.S. 909 (1967); Utah Pie Co. v. Continental Baking Co., 396 F.2d 161 (10th Cir.), *cert. denied*, 393 U.S. 860 (1968); Simpson v. Union Oil Co., 396 U.S. 13 (1969) (petition denied as to new trial issue)). No reason for review is presented here that did not also exist in those cases. The remaining case cited by petitioner (Zenith Radio Corp. v. Hazeltine Research, Inc., 397 U.S. 979 (1970)) presents the wholly different issue of alleged non-compliance with this Court's mandate in that very proceeding.

[10] Petitioner's lamentations as to the costs of this proceeding provide no basis for review of the new trial order. The rule holding such orders ordinarily nonreviewable would of course be nullified if review were justified simply by allegations that the proceeding had already proved expensive or that the new trial orders would, if upheld, result in additional expenses. Moreover, it is proper to observe that many of the costs about which petitioner now complains were the consequence of its insistence upon litigating uncontested issues at inordinate length.

CONCLUSION

For the reasons described above, the petition for writ of certiorari should be denied.

Respectfully submitted,

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AND HARTZOG-SCHNECK AVIATION, INC.,
A CORPORATION,
Respondents.

REPLY BRIEF FOR PETITIONER FONTANA AVIATION, INC.

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THE GUTHROP-WARREN PRINTING COMPANY, CHICAGO

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970.

No. 947.

FONTANA AVIATION, INC., A CORPORATION,
Petitioner,

vs.

BEECH AIRCRAFT CORPORATION, A CORPORATION,
AND HARTZOG SCHNECK AVIATION, INC.,
A CORPORATION,
Respondents.

REPLY BRIEF FOR PETITIONER FONTANA AVIATION, INC.

Respondents argue that this Court should deny review because the case (1) allegedly involves only a refusal to disturb the trial court's *discretionary* grant of a new trial, (2) is interlocutory, and (3) is not of sufficient importance to warrant this Court's attention.

Respondents do not seriously dispute any of the matters set out in our statement of the case. They do suggest, however, that because Fontana allegedly was unable to generate significant new plane sales while operating under the conspiracy restraints and prior to development of the corporate plane market, the testimony of its officer that it

would have completed sales in the 24 year period following termination was not to be believed. This, of course, was an issue for the jury, and both the trial judge and Court of Appeals credited this testimony. However, contrary to respondents' implication, the evidence showed that Fontana sold or would have sold but for the conspiracy restraints, five airplanes in the corporate class in the fifteen month period prior to termination at a gross sale price of approximately $1,000,000 (A. 659-70, 1788-80). At the estimated 10% profit this pre-termination experience would have projected to a $200,000 loss of profit during the post termination period, virtually the amount estimated by Fontana's officer. Further, Fontana's estimate of lost sales was corroborated by Hartzog's own sales experience and was reasonable in terms of quotas assigned by Beech for Hartzog's entire distributor territory (PX 135-149, A. 1719-1806; PX 111, A. 1645, 1650). As to petitioner's cumulative loss of $32,000 referred to by respondents, it is sufficient to point out that petitioner realized an operating profit of $23,500 on plane sales made in 1965, the last year prior to their termination, and in addition, the $69,000 of damages shown for the pre-termination period, the sufficiency of which respondents concede, would have changed the so-called cumulative loss into a $37,000 profit (A. 1844-5; 1680).

ARGUMENT.

I.

THE TRIAL COURT DID NOT GRANT THE NEW TRIAL ON DISCRETIONARY GROUNDS.

Respondents incorrectly state that the question presented by the petition is "Whether the Court of Appeals erred as a matter of law in declining to disturb the trial court's discretionary grant of a new trial in the particular circumstances of this case" (R. br. p. 1).

No exercise of discretion was involved in the grant of the new trial. The new trial order was based solely on a mistake of law. The trial court granted respondents' motion for judgment N. O. V., and alternatively for a conditional new trial, on the ground that petitioner had failed to prove the fact of damage. The trial court reached this conclusion after rejecting the damage proofs for reasons which the court below expressly holds to be erroneous as a matter of law.

In granting judgment notwithstanding the verdict the trial judge stated he was doing so because "the evidence, without regard to issues of credibility, *indicates that plaintiff was not damaged* in [any of the] instances discussed and, therefore, that the jury's verdict was in error." In a merely formal compliance with Rule 50(c), and without further discussion, the court in the next sentence said, "Defendants' motion for a new trial is conditionally granted, should this judgment be vacated or reversed. Rule 50(c), Fed. R. Civ. P." (App. B. p. 15). The accompanying judgment order recites that the new trial "is granted on the

grounds set forth in the Court's memorandum opinion" (App. B. p. 17).[1]

Necessarily then, the grant of a new trial was on the same mistaken legal grounds as the grant of judgment N. O. V. There was no attempt by the trial judge to independently justify or assign additional grounds for his new trial order. Even the court below acknowledges this to be the fact, stating:

> "The granting of the new trial conditionally was predicated on the *same* grounds supporting the granting of the motion for judgment n. o. v., presumably that there was no fact of damage. There is no indication in the court's memorandum opinion or order that the new trial was conditionally granted because of a failure to prove an antitrust case" (App. B. p. 22).

Obviously, if, as the Seventh Circuit held (App. B. p. 30), the jury determination of the fact of damage issue was not, as the trial judge had held, against the "overwhelming weight of the evidence",[2] it could not be against the clear or manifest weight of the evidence for new trial purposes.

1. In this connection it should be noted that the trial court similarly granted petitioner's motion for judgment N. O. V. on the counterclaim and conditionally granted a new trial. The only ground assigned was the legal ground that Hartzog was not the party injured within the meaning of Section 4. No additional ground was assigned for the conditional grant of a new trial (App. B. pp. 14, 15, 16, 22, 32). Obviously, if the Court of Appeals had held Hartzog was the party injured and not merely a conduit, the new trial order would also fall and could not be saved by any claim of "exercise of discretion."

2. The trial judge's use of the phrase "overwhelming weight of the evidence" in ruling on the N. O. V. motion is the N. O. V. test under the Illinois case of *Pedrick* v. *Peoria & Eastern Railroad Co.*, 37 Ill. 2d 494, 229 N. E. 2d 504 (1967) which the trial judge said he was applying rather than the *Brady* standard, 320 U. S. 476 (1943) (App. B. p. 5). As we have pointed out and as appears from the trial judge's opinion he did not purport to dismiss the damage proofs on credibility or weight of evidence grounds, but rather on legal grounds.

Locke v. *Atchison, Topeka and Santa Fe Railway Company*, 309 F. 2d 811, 817 (10th Cir. 1962). This is particularly the case where the Court of Appeals has held that the fact of damage "would appear to be implicit" in the violations proven and "flows naturally and expectedly from such activity" (App. B. pp. 28, 29).

Recognizing this inconsistency respondents would have it appear that the trial court did not limit his ruling to the fact of damage issue, but in granting respondents' alternative motion for a new trial exercised his discretion with respect to the *amount* of damage. Thus in their brief in opposition respondents state:

> "Among the grounds presented for a new trial was the proposition that the verdict, both in determination of liability and in amount of assessed damages, was contrary to the clear weight of the evidence, and would, if permitted to stand, result in a miscarriage of justice" (R. br. pp. 3-4).

After pointing out that the trial court did not decide but merely assumed the existence of an antitrust violation in ruling on the N. O. V. motion, respondents further state (R. br. p. 4, 7):

> "[The trial judge] ruled that respondents were entitled to judgment n. o. v. because, even assuming *arguendo* that an antitrust violation had been established, petitioner had failed to present evidence on the question of damages *adequate* to support a jury verdict in its favor. Based upon the sate of the record on this same issue, the court also *exercised its discretion* to grant, in the alternative, a new trial."
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> • • • • •
>
> "The result reached below represents, not usurpation of the jury's functions, but the application of well-settled principles by which a trial court, exercising sound judicial discretion, may act to prevent a miscarriage of justice."

Respondents' position that the trial judge exercised his discretion with respect to the amount of damages, cannot be reconciled with either the trial court's opinion or the position taken by respondents in the court below.

In his opinion the trial court said he was deciding the case only on the fact of damage issue. After acknowledging that the jury "may make a reasonable estimate of the damages based on all relevant data and inferences" once the fact of damage is established, he stated (App. B. p. 12):

> "*However, our discussion is concerned not with the reasonableness of the jury's calculations, but with the fact that they thought an injury had been proved.*" (Emphasis added)

Moreover, in their brief in the court below, respondents conceded that the trial court never reached the question of damage amount and therefore obviously did not purport to exercise any discretion on this issue. They stated (R. br. p. 3):

> "Nor did [the trial court] pass upon the question whether defendants should receive a new trial because plaintiff's case as to injury was in whole or in part based on false evidence or *whether the amount of the verdict was against the clear weight of the evidence*, or was such that a miscarriage of justice would result if it was permitted to stand." (Emphasis added)

Thus, clearly the trial court did not purport to exercise his discretion with respect to the amount of the verdict. Rather, he committed an error of law in ruling on the motion for judgment N. O. V., and that error necessarily invalidates the new trial order as well since that order was based on the same erroneous legal grounds. The new trial order automatically falls with the reversal of the judgment N. O. V. and cannot be saved by any claimed exercise of discretion because no discretion was involved in granting a conditional new trial.

II.

THE CASE IS "RIPE FOR REVIEW" BECAUSE THE COURT CAN FINALLY DISPOSE OF IT ON THE MERITS.

Respondents argue that the case is interlocutory and therefore "not yet ripe for review by this Court" (R. br. pp. 5-6). While the case is interlocutory in the sense that it is not final because of the new trial order, it is certainly "ripe for review". Under the decisions of this Court and the opinion of the court below, petitioner has fully and completely discharged its burden of proof. Petitioner proved a *per se* violation of the Sherman Act, loss of its valuable dealership as a result, and damages by competent evidence in more than the amount of the jury verdict. The jury was properly instructed as to the standards to be applied in determining damages. Nothing occurred in the conduct of the trial which might have prejudiced the jury's deliberations or prevented it from reaching a fair verdict.

Review at this time need not therefore result in a piecemeal disposition because the posture of the case is such that this Court can finally and completely dispose of it on the merits. Indeed, this Court would be justified in reinstating the jury verdict in petitioner's favor on the basis of the Court of Appeals' opinion because the error in requiring a second and unnecessary trial to prove again what the court has held petitioner proved at the first trial is apparent from the court's statement of the case and requires no independent review of the record.

III.

THIS CASE IS IMPORTANT TO THE EFFECTIVE ENFORCEMENT OF THE ANTITRUST LAWS.

Respondents argue that this case is not of sufficient importance to warrant this Court's attention. This argument is advanced notwithstanding the fact that the decision of the court below in refusing to disturb the new trial order sanctions a result directly in conflict with the decisions of this Court.

Those decisions establish that the jury's determination of the cause of injury and of its amount supported by the evidence is conclusive (Pet. pp. 19-21). Absent a showing that something occurred which may have prejudiced or tainted the verdict, it cannot be disturbed.

The fact that the court below acknowledges that under *Bigelow* "once there is sufficient evidence of the fact of damage to go to the jury, the assessment of the amount is largely a matter of the jury's consideration of all the evidence" (App. B, p. 31) does not make the conflict any less real. The Court of Appeals not only held that there was sufficient evidence of the fact of damage to go to the jury, but that damage was "implicit" and "flowed naturally" from the violation, thereby foreclosing any claim that the jury's verdict was against the manifest weight of the evidence. Nevertheless, under the decision of the court below petitioner must begin again and prove its case to the satisfaction of another twelve jurors.

It is this kind of disposition which pays lip service to the decisions of this court but denies plaintiffs the relief to which they are entitled that seriously threatens to undermine the efficacy of treble damage actions. It makes little difference to defendants how they win. A victory by attrition serves their purpose just as well and further serves to discourage other potential litigants. With the aid of the

lower courts, the new trial device is becoming an increasingly more effective weapon in defendants' arsenal.

This Court has repeatedly recognized the importance and deterrent effect of treble damage actions and has never permitted the fact that a petitioner may be only a small businessman to deter it from granting review. Indeed, this Court emphasized in *Klor's* (359 U. S. 207, 213) that a violation of the antitrust laws "is not to be tolerated merely because the victim is just one merchant whose business is so small that his destruction makes little difference to the economy."

Certainly this Court has an interest in seeing that its decisions are followed and effectively enforced in the antitrust area. Compliance with this Court's mandates is a matter of general importance and not merely a matter of concern to the litigants in this action.

CONCLUSION.

For the reasons stated herein and in our petition, a writ of certiorari should issue to review the judgment and opinion of the court below.

Respectfully submitted,

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